THE

APPEAL COURT REPORTS.

EDITED BY

A. L. DE WITT & G. E. G. WEERESINGHE,

PROCTORS.

VOLUME IV.

Colombo:

PRINTED AND PUBLISHED BY THE CEYLON EXAMINER PRESS.

1909.

MA 7359

LA
KF
1569
.S
1907

JUDGES OF THE SUPREME COURT.

(July—December, 1908.)

Chief Justice:

THE HON'BLE SIR JOSEPH TURNER HUTCHINSON, KT.

Puisne Justices:

THE HON'BLE MR. HENRY LORENSZ WENDT.

" " JOHN PAGE MIDDLETON.

" " ALEXANDER WOOD RENTON.

" " JOSEPH GRENIER (*Acting*).

LAW OFFICERS OF THE CROWN.

Attorney-General:

THE HON'BLE MR. ALFRED GEORGE LASCELLES, K.C.

Solicitor-General:

MR. JAMES CECIL WALTER PEREIRA, K.C.

TABLE OF CASES REPORTED.

	PAGE.
Abdul Rahiman v. The Colombo Municipal Council ...	26
Abayakoon v. Dionis	vii
Abubakker Lebbe v. Aponsu *et al.*	xii
Allahakoon v. Wickremesinghe	8
Andris Appu v. Daniel	i
Andris v. De Silva	xi
Attorney-General v. Ponniah	x
Attorney-General v. Perera	xii
Attorney-General v. Louis Hamy	xiv
Attygalle v. Wickremetunge	158
Baba Singho *et al.* v. Don Salmon *et al.* ...	75
Babai Hamy v. Marcina Hamy *et al.* ...	x
Banda v. Mohotty Hamy	46
Banda v. Ramasamy	ii
Banda *et al.* Banda	xv
Bell v. The Colombo Municipal Council ...	26
Bliss v. Sandai	103
Cader v. Perera	166
Carpen Chetty v. Christina Hamy *et al.* ...	160
Ceylon Land & Produce Company v. Seneviratne ...	xx
Corea v. Girigoris	xvi
Cornelia v. Samodis ...	vi & 139
Coste v. Abeyakoon	35
Costa v. Fernando *et al.*	ix
Darley Butler & Co. v. De Silva	xiv
De Zilva v Juan	vii
Dias v. Von Possner	49
Dines v. Jayawardene	vi
Dinesa *et al.* v. Baiso	xvii
Dingihamy v. Janis Appu	xix
Dureya *et al.* v. Siripina	125
Ensohamy v. Marikar	53
Fallil v. Weerappen	iv
Fernando v. Fonseka	5
Fernando v. Perera *et al.*	119
Fernando v. Anthonipillai	v
Fernando v. Marikar	ix
Fernando *et al.* v. Fernando	xiv
Fernando v. Eassin	xv
Fernando v. Perera *et al.*	xv
Fernando *et al.* v. Hetu Etana	xx
Fonseka *et al.* v. Nona	xv

	Page.
Galle Voters' Case	143
Godagama v. Mathes	viii
Goonetilleke v. Allis	iv
Goonetilleke v. Mam Neina	xviii
Goonewardene v. Babun ...	v & 141
Goonewardene v. Perera *et al.*	xiii
Government Agent, W. P. v. Coorey *et al.* ...	iv
Government Agent, Western Province v. Palaniappa Chetty *et al.*	1
Graham v. Alagie	v
Grant v. Alagamma	165
Greve v. Carpen	vii
Gunesekere v. Christina Hamy	ii
Harmanis v. Carlina *et al.*	xii
In the matter of the Estate of Rengaswamy, deceased	i
In the matter of the Estate of James Perera, deceased	iii
In the matter of the Insolvency of Gaffoor ...	129
In the matter of the Insolvency of Gaffoor ...	xvii
In the matter of the estate and effects of Don Emis, deceased	157
In the matter of the last will and testament of Sultan Umma	xi
Ismail v. Brocher	43
Ismail Lebbe v. Gustan Appu	xvi
Jalaldeen v. The Colombo Municipal Council ...	131
Jayawardene v. Thegris *et al.*	109
Jayawardene v. Isi Lebbe	xiv
Josin Nona *et al.* v. Batin Nona *et al.* ...	xi
Juan Appu v. Sinna Swami	21
Karunawardene v. Wijesooriya	65
Kalu v. Lami	30
Keramen *et al.* v. Marikar	xix
King v. Dharmawardene *et al.*	iv
King v. Boova *et al.*	xvii
King v. Dias	ix
King v. Fernando	xviii
King v. Fernando	xx
King v. Nagamany	xix
King v. Podi Singho	x
King v. Podi Sinno	iv
Kindersley v. David	176
Kiriwante v. Siribaddana *et al.*	xi
Kiri Banda *et al.* v. Dingri Menika	42
Kiri Banda v. The Government Agent, Sabaragamuwa Province	69
Kiri Baiya v. Slema Lebbe *et al.*	71
Kira v. Menika	152
Kouna Hami v. Jayasuria	xiii
Kulatungam v. Sapapathipillai *et al.*	135

	PAGE.
Kuruneru v. De Silva	11
Lady de Soysa v. The Municipal Council of Colombo...	149
Mack v. Attorney-General	xviii
Mackie v. Fernando	xvii
Marthelis Appu v. Jayawardene *et al.* ...	17
Marikar v. Caffoor	x
Menchi Nona v. Hendi Sinno	ii
Mohamed Bhoy *et al.* Dias *et al.*	xi
Nadan v. Perumal *et al.*	v
Nawana v. Fernando	vi
Ogilvy v. Carupen	106
Pakeer Bawa *et al.* v. Hassen Lebbe	61
Palaniappa Chetty v. Gomes *et al.*	vii
Pedro Appuhamy v. Silva	xvi
Peiris v. Subasinghe	xix
Perera v. Silva	33
Perera v. Silva	74
Perera v. Silva *et al.*	79
Perera v Perera	iii
Perera v. Awishamy *et al.*	115
Perera v. James	122
Perera *et al.* v. Fernando	xiii
Perumal Chetty v. Goonetileke	ix
Pieris v. Kankani	111
Pinto v. Ukku ...	viii & 163
Ponnamma v. Weerasooria *et al.* ...	...iii & 57
Powers v. Massachuesetts Homœopathic Hospital ...	81
Rahiman v. Amardeen *et al.*	28
Rangmenik v. Gangawate Korale *et al.* ...	viii
Rodrigo *et al.* v. Gregoris *et al.*	xvi
Saibo v. Saibo	45
Saibo v. Katirkamertamby	vi
Sallay v. Perera	77
Sarvai v. Murray	37
Saunders v. Sinniah Kangany	102
Sego Lebbe v. Sultan Marikar *et al*	118
Segu Mohamado v. Govinden	xiii
Senaratne v. Charles *et al*	xiii
Senanayake *et al.* v. Disanayake *et al.* ...	xvii
Silva *et al.* v. Silva *et al.*	iii
Silva v. Silva	153
Silva v. Fernando	xiv
Singho Appu v. Amarasuriya	v
Singer Mfg. Co., Ltd. v. Perera	viii
Sourjah v. Fernando	xviii
Surveyor-General v. De Zilva ...	ii & 168
Swaris v. Pieris *et al.*	155
Theonis v. Simanis	iv
Thepanis v. Perera *et al.*	vii

	Page.
Thiagarajah v. Pillai *et al.*	xv
Tilakeratne v. Wijesingha	ix
Wijeysekere v. Perera	23
Wickremesinghe v. Batta	ii
Walliamma *et al.* v. Muttu Nadan	113
Wijesinghe v. Bawa	v
Wijeysinghe v. De Saram	vi
Ukku Menika v. Dingiri *et al.*	15
Ukku Menika v. Ratwatte	126

THE

APPEAL COURT REPORTS.

THE GOVERNMENT AGENT, WESTERN PROVINCE
vs. PALANIAPPA CHETTY *et al.*

No. 2,266, D. C. (Crown), Colombo.

Present: Hutchinson, C. J., & Grenier, A. J.

Argument: 21*st May*, 1908.

Judgment: 29*th May*, 1908.

Deed of gift—Power of revocation—Execution of subsequent deed—Necessity of special deed of revocation.

It is lawful for a donor to reserve to himself in the deed of gift the power to revoke the gift.

Subsequent dealing with the property by a donor in pursuance of a power of revocation, though without express mention being made of it, is valid.

An appeal from a judgment of the Acting District Judge of Colombo (H. A. Loos, Esq.).

In this case the Crown acquired for a public purpose a piece of land at Kotahena, and brought into Court a sum of Rs. 1,585. The sufficiency of the amount awarded as compensation was not disputed; but there were three claimants to the money in deposit: Palaniappa Chetty, Mary Moraes, and Maria de Wett. The first claimant based his claim on a fiscal's transfer of 31st August, 1904, by which the premises in question were sold in execution against Ahamado Ali Abdul Hassen, who traced his title back to Silvestry Perera, to whom the property in question had been gifted by Simon Moraes by deed of gift No. 4819, dated 30th July, 1897, subject to certain conditions, viz., that the donee shall not have power to sell, mortgage,

The Govt. Agent, W. P. v. Palaniappa Chetty et al.

or alienate the premises; and that during the lifetime of the said Simon Moraes and his wife, Justina Perera, the donor reserved to himself and his wife the full control of the premises, the rents and profits thereof, and the right to mortgage, sell, grant, or otherwise deal with the premises as if such deed of gift had not been made. Simon Moraes died on 23rd September, 1897, without issue, and his widow, by deed No. 9594, dated 12th May, 1898, made an absolute gift of the premises to Silvestry Perera. The second and added claimants claimed through another deed of gift No. 3386, dated 22nd June, 1894, by which Simon Moraes gifted the premises to Mary Moraes (the second claimant), subject to prohibition against alienation, and also subject to a right in favour of Maria de Wett (the added claimant) to take and use the rents and profits of the said premises during the period and until the said Mary Moraes was a minor or remained unmarried. The donor further reserved to himself the full control of the premises, the rents and profits thereof, and the right to mortgage, sell, grant or otherwise deal with the premises as if such deed had not been made and executed.

The learned District Judge held the deed No. 3386 was revoked by the execution of deed No. 4819, and that the first claimant was entitled to the compensation paid by the Crown.

The second and added claimants appealed.

Bawa for second and added claimants :—The deed No. 3386 is, it is submitted, an absolute deed of gift. The reservation in favour of Simon Moraes is void and of no operative effect. It is a condition which is repugnant to a gift. It is submitted that a donor in a Roman Dutch Law deed of gift cannot reserve the right to revoke a deed. The Roman Dutch Law only recognises revocation in particular cases [Voet 39. 5. 22, 26; 2 Nathan, 1088-1090]. The deed being an absolute deed of gift, the appellants could not be divested of title until a conveyance was executed by them in favour of Simon Moraes.

F. M. de Saram, for first claimant, was not called upon.

c. a. v.

The Govt. Agent, W. P. v. Palaniappa Chetty et al.

JUDGMENT.

HUTCHINSON, C. J.—This is an appeal by two claimants against an order disallowing their claim to a sum of money which had been awarded and paid into Court as compensation for a piece of land which the Crown had taken for public purposes.

There were three claimants to the money: Palaniappa Chetty, Mary Moraes, and Maria de Wett.

It was admitted that Simon Moraes had been the owner of the land and that he had executed two deeds, the first dated 22nd June, 1894, in favour of Mary Moraes, and the second dated 30th July, 1897, in favour of the plaintiff's predecessors in title; each of these deeds purported to dispose of the land; and the only issue is, which of the two deeds is to prevail.

By the deed of the 22nd June, 1894, Simon Moraes, reciting that he was desirous of granting certain properties by way of gift to Mary, the daughter of Maria de Wett, subject to the conditions and restrictions thereinafter contained, granted this land to the said Mary and her heirs as a gift, to hold to her and her heirs for ever, "subject, however, that the said Mary shall have no power or liberty to sell or mortgage, grant or alienate the said several premises or any part thereof during her lifetime; that the said Maria de Wett, the mother of the said Mary, shall have the right to take and use the rents and profits of the said premises during the period and until the said Mary shall remain a minor or unmarried for the sole maintenance of the said Mary and herself;...........that if the said Mary have no issue or die unmarried the said premises shall revert and devolve to the common estate of me the said Simon Moraes; and further that during the lifetime of me the said Simon Moraes I hereby reserve to myself the full control of the said premises, the rents and profits thereof, and the right to mortgage, sell, grant, or otherwise deal with the said premises as if these presents had not been made and executed". Maria de Wett and her daughter Mary are the two appellants. The daughter was a minor at the date of this deed, and the mother in the deed accepts the foregoing gift in her behalf, subject to the conditions and restrictions hereinbefore recited. By the deed of 30th July,

The Govt. Agent, W. P. v. Palaniappa Chetty et al.

1897, Simon Moraes, without mentioning the former deed, but reciting that he is entitled to the property and is desirous of granting it to the persons therein named, subject to the conditions thereinafter mentioned, granted various properties to four persons, the land, the compensation for which is now in question, being granted to M. M. Silvestry Perera, to hold to them and their heirs for ever, subject to the following conditions;—and then follows a restraint on alienation during the lifetime of the grantees, and a reservation to the grantor and his wife, during the lifetime of himself and his wife, of power to deal with the property as if that deed had not been made. Simon Moraes died in September, 1897, without issue, and his widow afterwards purported to make on absolute gift of the land to the same Silvestry Perera. Whether she had power to do so or not is immaterial. The first claimant traces his title from Silvestry Perera.

The District Judge held that the gift made by the deed of 1894 was revoked by that of 1897, and that the first claimant was entitled to the money in Court. The appellants contend, first, that it is not lawful for a grantor in a deed of gift to reserve to himself a power to revoke the gift; and, secondly, that if such a reservation is lawful the execution of the deed of revocation has no effect on the property, which was by the original deed vested in the original grantee and can only be divested by a notarial writing executed, by that grantee, and that all the revocation effects is to give the grantor a right to sue the grantee for an order requiring him to retransfer the property.

I can see nothing in such a power of revocation which is opposed to any enactment or to public policy or to morality. Mr. Bawa referred us to passages in Voet Bk. 39., tit. 5, secs. 22 and 26, and 2 Nathan 1088, 1089, 1090; but I agree with the District Judge that those passages refer only to gifts in which no power of revocation is reserved. This is not like those difficult cases which sometimes occur in gifts, especially in home-made wills, where there is an absolute gift followed by a condition which is inconsistent with an absolute gift, without any provision as to what is to happen in case the condition is broken, and where the Court, having to decide what is to happen when the condition has been

broken, sometimes feels compelled to say that no effect at all can be given to the condition.

With regard to the second point, I am of opinion that all that is required by Ordinance 7 of 1840 is that the transfer, that is in a case like this, the revocation, should be in writing signed by the person making it and attested in the manner required by sec. 2. The Ordinance merely provides for the form in which the transfer is to be made; whether the transferor has power to make the transfer at all is another matter.

In my opinion the order appealed from is right, and this appeal should be dismissed with costs.

GRENIER, A. J.—I entirely agree.

FERNANDO *vs.* FONSEKA.

NO. 6,841, D. C., NEGOMBO.

Present: HUTCHINSON, C. J., & WENDT, J.

14th July, 1908.

Lessor and lessee—Possession of leased land by lessor—Prescription—Ordinance No. 22 of 1871, sec. 3.

There is nothing in the relations of lessor and lessee to prevent the application to them of the provisions as to prescription contained in sec. 3 of the Prescription Ordinance.

A lessor, who holds possession of the leased property without any act from which an acknowledgment of the lessee's right can be inferred, keeps possession of the property leased in the sense in which "possession" is used in the Prescription Ordinance.

The plaintiff's predecessor in title leased the land in question in 1888 for a period of 40 years, but continued to be in possession of it until his death in 1905. After his (the lessor's) death the lessee assigned his rights under the lease to the defendant. Plaintiff in this action prayed for a declaration of title to the land and for ejectment of the defendant therefrom, alleging that the defendant entered into forcible possession of the land in 1906. The District Judge upheld plaintiff's title, but dismissed his prayer for ejectment.

Fernando v. Fonseka

H. A. Jayawardene for plaintiff-appellant:—Since ten years had gone by, and there had been no possession by the lessee, the lessor got full *dominium* again, and was entitled to have the defendant ejected.

The present action was easily convertible into a possessory action [*Fernando* v. *Perera* (4 N. L. R. p. 195)]; and since plaintiff alleged that force was used at ouster, no possession by him for a year and a day previous to ouster was necessary [*Goonewardene* v. *Perera* (5 N. L. R. p. 320)].

Bawa (*Prins* with him) for defendant-respondent:—The cases cited had no application to the present case. As to *Fernando* v. *Perera* (4 N. L. R. p. 195), there had been no finding that plaintiff possessed *ut dominius* after the death of the original owner; and there having being no issue as to violence, *Goonewardene* v. *Perera* (5 N. L. R. p. 320) did not apply.

It did not matter if a lease was not acted upon: the lessee at such time as he pleased could enforce it. At the date of action the lessee was in possession.

Sec. 3 of Ordinance No. 22 of 1871 had no application. Since a lessee's possession was his lessor's, and enured to the benefit of the lessor, how could their interests be adverse? Further, this section referred only to title, and was on that ground also inapplicable to the case of lessor and lessee. A lessor in possession would be liable for rent in return for the occupation promised to lessee.

Jayawardene in reply:—Sec. 3 cannot be restricted to title. The plaintiff had satisfied the Ordinance: the interests of a lessor and lessee were adverse during the existence of the lease. A lessor could keep the lessee out and defeat his rights.

JUDGMENT.

HUTCHNISON, C. J.—The District Judge says that everything goes to show that the deceased, Siyadoris Fonseka, continued to possess the land after the granting of the lease, under which the defendant claims, up to his death. I am not satisfied that that finding is wrong, and I think we must accept it. We must accept it as a finding that the lessor from the date

Fernando v. Fonseka

of the lease in 1888 until his death in 1905 kept possession of the property leased in the sense in which "possession" is used in the Prescription Ordinance, and I think that under sec. 3 of that Ordinance (No. 22 of 1871) plaintiff is entitled to judgment. That section enacts that when a plaintiff sues to establish his claim to immoveable property in any manner, proof of such undisturbed and uninterrupted possession, as before explained, by him or by those under whom he claims, shall entitle him to a decree in his favour; and in the earlier part of the section that possession is explained to be a possession "unaccompanied by payment of rent or by any other act from which an acknowledgment of a right existing in another person would fairly and naturally be inferred". In my opinion that applies to the case of a lessor holding possession of the leased property without any act from which an acknowledgment by the lessee's title can be inferred. I think the decree appealed from should be amended by ordering defendant to be ejected from the property and the plaintiff restored to possession.

WENDT, J.—I am of the same opinion. I do not think there is anything in the relations of lessor and lessee to prevent the application to them of the provisions as to prescription contained in sec. 3 of the Prescription Ordinance. It is true that the lessee's interest is created by the lessor himself; but the same may be said of a sale. If adverse possession by a lessor of a lessee's interest be proved, the lessor would be entitled to the judgment mentioned in the section.

Allahakoon v. Wickremesinghe

ALLAHAKOON *vs.* WICKREMESINGHE.

NO. 5,103, C. R., COLOMBO.

Present: GRENIER, A. J.

ARGUMENT: *26th May*, 1908.

JUDGMENT: *29th May*, 1908.

Abatement—Order ex mero motu—*Effect—Partition action—Sec.* 402, *Civil Procedure Code.*

An order of abatement in the first instance and by itself does not finally terminate and put an end to the action, but generally has only the effect of removing the case from the list of pending cases, for it is open to the plaintiff to move to have it restored to the list on sufficient cause shewn.

An order of abatement (under sec. 402 of the Civil Procedure Code) should not be entered by the Court *ex mero motu*, but on the application by the defendant on due notice to the plaintiff.

Fernando v. *Peris* (3 N. L. R. p. 77); *Cave* v. *Erskine*, (6 N. L. R. p. 338) followed.

Where in a partition suit the interlocutory decree under sec. 4 of the Partition Ordinance (No. 10 of 1863) is not proceeded with, the Court may apply to it sec. 402 of the Civil Procedure Code, and clear the roll of the action.

Such an order may not be made *ex mero motu* by the Court, but on the application of the defendant.

A. St. V. Jayawardene (with him *Batuwantudawa*) for appellant.

Aserappa for respondent.

c. a. v.

JUDGMENT.

GRENIER, A. J.—This is an action under sec. 247 of the Civil Procedure Code. Defendant as judgment-creditor issued writ against the judgment-debtor in C. R., Colombo, No. 3,805, and seized two lands, and advertised them for sale, when the plaintiff claimed them. The claim was disallowed, and hence this action. The plaintiff's claim was founded upon a conveyance in his favour dated the 27th February, 1906, executed by one K. Swaris Appu. The defendant pleaded as a matter of law that the plaintiff's conveyance was null and void, as the same had been excuted during the pendency of

Allahakoon v. Wickremesinghe

the partition suit No. 12,290 of the District Court of Colombo, to which the judgment debtor in case No. 3,805, C. R., Colombo, was a party, the plaintiff's vendor being the second added defendant in the partition action, and the two lands now in question being the subject matter of the action.

The Commissioner was of opinion on the law, there being no merits, that the interlocutory order that had been entered up in the partition action on the 19th December, 1899, had by the lapse of time, nearly eight years, been converted into a final decree, or, in the words of the Commissioner, "the interlocutory order should have the effect of a final judgment". Admittedly no final decree had been entered under sec. 6 of the Partition Ordinance; and I fail to see how by some obscure automatic process, instead of by the direct act of the Court, an interlocutory decree can so radically change its character and scope as to have the effect of a final decree. The fact, therefore, remains that the partition action is still pending. It was admitted by both sides in the Court below that the plaintiff is dead; but this is not one of those cases in which the right to sue does not survive, as it is quite competent for the heirs or legal representatives of the plaintiff to carry on the action to a final termination, it being only necessary to add fresh parties, as is so frequently done in similar circumstances in our Courts (sec. 395, Civil Procedure Code).

There was a question raised as to whether the action had not abated. It was argued for the respondent that if the action had abated, the parties to it could deal freely with the lands by transfer and otherwise. But an order of abatement in the first instance and by itself does not finally terminate and put an end to the action, but generally has only the effect of removing the case from the list of pending cases, for it is open to the plaintiff to move to have it restored to the list on sufficient cause shewn (sec. 403). The section of the Civil Procedure Code which deals with orders of abatement, sec. 402, enacts that: "If a period exceeding twelve months in the case of a District Court............elapses subsequently to the entry of an order or proceeding in the record without the plaintiff taking any step to prosecute the action where any such step is necessary, the Court may pass an order that the action shall

Allahakoon v. Wickremesinghe

abate." It has been held by this Court that an order for abatement under this section should not be entered by the Court *ex mero motu*, but on application by the defendant on due notice to the plaintiff [See *Fernando* v. *Peries* (3 N. L. R. p. 77); and *Cave* v. *Erskine* (6 N. L. R. p. 338)].

In the case before me, although the interlocutory order was entered in the partition action nearly eight years ago, no final decree has yet been entered. It was open to the defendant upon notice to the plaintiff to have an order of abatement entered by the Court, but he has not thought proper to do so. In *Peris* v. *Perera*, 1 N. L. R. p 362, it was held by this Court that where in a partition suit an interlocutory decree under sec. 4 of the Ordinance 10 of 1863 is not proceeded with, the Court may apply to it sec. 402 of the Civil Procedure Code and clear the roll of the action. But I take it that such an order of abatement may not be made *ex mero motu* by the Court, but on the application of the defendant.

It is common ground in this case that no order of abatement, whatever may be the effect of it, was made in the partition action; and I have no alternative but to hold that, as the action is still pending, the conveyance to plaintiff is null and void. The judgment of the Court below is set aside, and the plaintiff's action dismissed with costs.

KURUNERU *vs.* DE SILVA.

Kuruneru v. *de Silva*

No. 3,282, D. C., Chilaw.

Present: Wood Renton, J., & Grenier, A. J.

Argument: 15*th June*, 1908.

Judgment: 23*rd June*, 1908.

Partition—Owner of divided share—Conduct—Intervention—Planter's interest—Allegations of co-ownership—Sec. 2 *of Ordinance No.* 10 *of* 1863.

A defendant to a partition suit (who was admittedly entitled to a specific divided portion of land, but was alleged to be in possession of a larger portion) filed answer, raised no question to being made a party, set up his own claim of title, allowed the plaintiff to call evidence, and put his own evidence before the Court; but at the close of the plaintiff's case he took the point that a partition action would not lie against him. The District Court ordered a partition of the land.

Held: That the conduct of the defendant was practically equivalent to an intervention, and that the adjudication of the District Court ought not, in view of such conduct, to be disturbed on the ground that a partition action was an improper remedy.

Also: The fact that no provision had been made in the decree for planter's interest was no ground for setting aside the entire decree.

Further: The case of *Peris* v. *Perera* (1 N. L. R. p. 362) does not seem to be any authority for holding that the allegations of co-ownership, which sec. 2 of Ordinance No. 10 of 1863 seems to require from the plaintiff in a partition suit, can be dispensed with.

The plaintiff in this case brought this action for partition of a certain land. The defendant was admittedly the owner of a specific divided portion of land; but the plaintiff complained that he (the defendant) was in possession of a larger portion than he was entitled to, and accordingly prayed for a partition. The District Judge ordered a partition as prayed for with costs. The defendant appealed.

C. M. Fernando (with *Bawa and Chitty*) for appellant:—An action *rei vindicatio* is the proper form of action against the appellant. This is an attempt to evade stamp duty. If partition actions of this sort are allowed, a plaintiff in a case of disputed boundary will bring a partition suit and save stamp duty.

Kuruneru v. *de Silva*

Cited: *Sinchiappu* v. *Wijeygoonesekera* (6 N. L. R. p. 1).

H. J. C. Pereira for plaintiff-respondent :—Ownership in common is not the only qualification for a defendant in a partition suit. Any other *interest* is sufficient (*Jayasin Appu* v. *Ekanaike et al.*, 1 Br. p. 320; *Queen* v. *Nassar*, 2 N. L. R. p. 372; *Nona Baba* v. *Namohamy*, 3 N. L. R. p. 12). If the defendant was allowed to intervene, he could have been made a defendant.

c. a. v.

The judgment of the Court was delivered by Wood Renton, J.

JUDGMENT.

WOOD RENTON, J.—I am disposed to agree with Mr. Fernando that the plaintiff respondent was not entitled in the first instance in this case to proceed against the appellant under the Partition Ordinance (No. 10 of 1863); and if the objection had been promptly taken in the Court below that the respondent was using the provisions of that enactment for the purpose of settling a disputed question of boundary between himself and the appellant, I am not prepared to say that it ought not to have prevailed. None of the cases to which Mr. Pereira referred us decides, or necessarily involves, the proposition that a plaintiff can bring in as defendant to a partition action a party whom, as in the present case, he not only does not allege to be a co-owner, but by language of his plaint excludes from co-ownership.

In *Sinchiappu* v. *Wijeygoonesekere* [(1902) 6 N. L. R. p. 1] it was held that a person claiming to be co-owner of an undivided share of land may bring an action of partition although neither he nor his predecessor in title has had possession and although the defendants wholly deny his title. It does not follow that such action would lie without any allegation; and, indeed, in the face of a denial in the plaint of the existence of any co-ownership in the defendant. *Jayasin Appu* v. *Ekanaike* [(1900) 3 Br. p. 320] is equally little in point. There an added defendant came in claiming a share; and Browne, J., said *obiter* that the plaintiff would have been well advised if he had made him an original defendant.

Kuruneru v. de Silva

Perhaps he would; but the *dictum* throws no light, that I can see, on the case now before us. Again, in *Peris* v. *Perera* [(1896) 1 N. L. R. p. 362] it was laid down that the Court, if satisfied that the plaintiff had made out a title, should direct inquiries as to whether all parties "interested" in the land had been made parties or served with notice; and if so satisfied, should order partition or sale. In *Peris* v. *Perera* certain added parties to the suit claimed an undivided portion. It does not seem to be any authority for holding that the allegation of co-ownership, which sec. 2 of Ordinance 10 of 1863 seems to require from the plaintiff in a partition action, can be dispensed with.

But Mr. Fernando admitted that if his client had intervened in the partition proceedings, the Court would have adjudicated on his claim. Now, it seems to me that the conduct of the appellant in the present case was, and ought to be held by us to be, practically equivalent to an intervention. He filed an answer to the plaint raising no objection to his being made a party, but, on the contrary, setting up his own claim of title, and allowed the respondent to call evidence in support of his case. Although he did, through his proctor, take the point, at the close of the respondent's evidence, that a partition action would not lie, he proceeded to put his own evidence before the Court, and the Court has adjudicated on his claim, an adjudication with which we ought not, I think, to interfere on the merits. We ought also, in my opinion, in view of the appellant's own conduct in the suit, to decline to disturb that adjudication now on the ground that a partition action was an improper remedy under the circumstances of this case. In *Assena Marikar* v. *Usuma Lebbe* [(1878) 1 S. C. C. p. 19], whose authority still remains untouched on the point, I am about to mention, Phear, C. J., said that the right of intervention in a partition suit before the trial as between the existing parties was completed, when it can be justified on the principle of avoiding possible circuity of actions and multiplicity of suits, may be placed on as firm a foundation as the suit itself.

I think that the same principle justifies us in refusing to relieve the appellant from the consequences of what was

Kurunеru v. de Silva

practically an intervention on his part. I do not think the fact that no provision has been made in the decree for the planter's interests would under any circumstances constitute a reason for setting the entire decree aside. Under sec. 19 of the Partition Ordinance appeals to the Supreme Court against decrees or orders made under the authority of the Ordinance are subject to the general law. After special consultation on this point with my brother Grenier, I would propose, however, that the case should go back to the District Court in order that the interests which at the present time Elaris Appuhamy and Hendrick Appuhamy, the added parties, have respectively in the portions A and B by virtue of their planting agreement No. 2789 dated 30th January, 1884, and receipt dated 2nd February, 1898, may be definitely ascertained, as there is no finding by the District Judge on this point. Thereafter the District Judge should amend the decree by specifically allotting to the two planters the interests they are entitled. The shares of the plaintiff and the second, third, and fourth defendants have been correctly allotted; but that part of the decree which gives the first defendant-appellant the portion C should be struck out, as the District Judge has found, and it is admitted by both parties, that C is a separate land, belonging to the first defendant-appellant, and forming no part of A and B. It should, therefore, be excluded from the decree. The first defendant's appeal will be dismissed with costs.

UKKU MENIKA *vs.* DINGIRI *et al*

No. 16,152, C. R., Kurunegalle.

Present: Hutchinson, C. J.

2nd July, 1908.

Vendor and vendee—Covenant to warrant and defend—Action against vendor for return of purchase money and damages.

A. purchased certain land from B., who covenanted in his deed of transfer to warrant and defend his title. A. instituted a partition action in respect of the same land, and did not call upon his vendee to warrant and defend title. A.'s action was dismissed.

Held: That A. was not entitled to maintain an action for the recovery of the purchase money and damages.

Where the buyer of land is evicted by a person with a superior title to that of his vendor, and where there was an express covenant in the deed of conveyance, the only remedy of the buyer is on that covenant.

Plaintiff was the vendee of certain land, and the vendors in their deed of transfer had covenanted to warrant and defend their title if any dispute arose in regard to it. Plaintiff subsequently brought an action for the partition of the land in question, and summoned her vendors as witnesses, but did not formally notice them to warrant and defend title. This action was decided on the oath of the defendant, and plaintiff's action was dismissed. In the present action the plaintiff sought to recover her purchase money and also expenses incurred by her in the partition case. The appeal was against the dismissal of the action by the Commissioner.

Prins for plaintiff-appellant:—It is admitted that as a rule it is necessary to fomally cite vendors to warrant and defend title; but in the present case the appellant relied on the decision of *Fernando* v. *Jayawardene* (2 N. L. R. p. 309). Since the evidence showed that the vendor had no title whatsoever, the present action was maintainable.

H. A. Jayawardene for respondents:—It was plaintiff's own fault in undertaking the greater burden of a partition action instead of bringing an action *rei vindicatio*. No notice had been given to the vendors to warrant and defend their

Ukku Menika v. Dingiri

title. Further, the plaintiff cannot now sue her vendors. (Voet 21. 3. 30.): "Also (these actions fail) when the purchaser, before being condemned, has voluntarily given up the thing to the plaintiff, or has compromised with him, or agreed to arbitration, or has submitted to the decision of an incompetent judge, or has referred the dispute to his adversary's oath." There is no allegation in the plaint that we had no title, and such an allegation was necessary.

Cited: 1 Supreme Court Decisions p. 43.

JUDGMENT.

HUTCHINSON, C. J.—Plaintiff, who is the appellant, alleged that defendants sold some land to her and in the deed of transfer covenanted with her in the event of any dispute about the land to warrant and defend their title to it, that she afterwards brought an action for partition of the land in which she summoned the defendants as witnesses at the trial to warrant and defend their title, and that the action was dismissed. The reason why it was dismissed I do not think is material. She, therefore, claimed the return of the purchase money which she paid and also her expenses of the partition action. The Commissioner dismissed the action, and plaintiff has appealed. I think the dismissal was right. Where the buyer of land is evicted by a person with superior title than his vendor, and where there was an express covenant in the deed of conveyance by the vendor such as is alleged in this case, the remedy of the buyer is on that covenant. This is an action founded on that covenant. There is no allegation in the plaint that defendants had no title, and there is no issue settled as to whether they had no title. But even if it were alleged and proved that they had no title, I think she could not succeed in an action such as the present, because the defendants were not duly notified to warrant and defend title in the partition action; and she could not succeed in an action simply to recover the purchase money and damages upon the allegation that defendants had no title, because her only right is under the covenant contained in their deed. On that point I would follow the decision reported in the Supreme Court Decisions p. 43. The appeal is dismissed.

MARTHELIS APPU *vs.* JAYAWARDENE *et al.*

No. 3,386, D. C., Chilaw.

Present: Hutchinson, C. J., & Wood Renton, J.

Argument: 18*th June*, 1908.

Judgment: 1*st July*, 1908.

*Agreement to sell—Contract by married woman—Written consent of husband—Money paid on such an agreement—Recovery—Period of prescription—*Mala fide *possession.*

An agreement by a married woman to convey land of which she alleges herself to be the owner is invalid and unenforceable if made without her husband's written consent.

Money paid under such an agreement is recoverable.

The right to recover such money accrues immediately, and is prescribed in three years.

A person who takes possession in the mistaken belief that he has good title, or that he is certain to obtain one, whether his mistake be of fact or of law, cannot be said to do so *mala fide.*

Garvin for plaintiff-appellant.

Wadsworth for defendant-respondent.

c. a. v.

JUDGMENT.

Hutchinson, C. J.—This is an appeal by the plaintiff against a decree dismissing his action. In his plaint he says that the first defendant, alleging herself to be the owner of certain land at Mudukatuwa, agreed to sell it to him for Rs. 800, and received from him Rs. 720 from time to time between April, 1901, and September, 1901, and put him in possession of the land, and agreed to execute a valid transfer of it to him within a few months, when the second defendant, who is her husband, and who was absent, should return; that though frequent demands were made the defendants failed to execute the transfer; and that he had built two houses on the land and improved it at a cost of Rs. 500, and he asked that first defendant be called on to execute the transfer, or in the alternative that she be ordered to pay to him the Rs. 720, and Rs. 500 as damages.

The defendants in their answer said that the contract,

Marthelis Appu v. Jayawardene

if any, on which the action is based is void in law, inasmuch as it was not entered into with the consent of the second defendant; that it was also void as it was not executed in terms of sec. 2 of Ordinance 7 of 1840; that the claim for consideration (*i.e.*, the Rs. 720) is prescribed; that the compensation for improvements cannot be claimed because the plaintiff was a *mala fide* possessor, and the improvements, if any, were not necessary; the first defendant admitted having received Rs. 720, for which she said the plaintiff was allowed to enjoy the produce of the land from April, 1901, to January, 1905; the second defendant said that his wife received the Rs. 720 without his consent or knowledge, and they denied that the plaintiff had made the improvements which he alleged.

In answer to the interrogatories the first defendant swore that she did not agree with the plaintiff in 1901 to sell to him any land at Mudukatuwa and that she took no money from him on such an agreement.

The District Judge, without any evidence being taken, held that the plaintiff could not maintain the action because the first defendant was a married woman and her husband was not a party to the transaction. There were other issues agreed upon: the third was whether the claim for the Rs. 720 was prescribed, and the sixth and seventh referred to the claim for compensation for improvements; but the District Judge expressed no opinion on them.

The first defendant had no power to dispose of the land without the written consent of her husband; and the agreement which the plaintiff alleges with her was of no avail for the purpose of disposing the land.

If she received the Rs. 720 from him on account of the agreement, she was bound to repay it; and his right to recover it accrued at once, and is now barred by the lapse of more than 3 years since the payment.

As to the claim for improvements on which the District Judge has not touched, if the plaintiff's story is true he was put in possession of the land by the owner of it under an agreement with her to sell it to him, and he paid her Rs. 720 in pursuance of the agreement and expended his money on the land in reliance on the agreement. It cannot be said,

Marthelis Appu v. Jayawardene

if those are the facts, that he took possession in bad faith. For many purposes a man is presumed to know the law. But he is not necessarily a "*mala fide* possessor" because he knew, or must be presumed to have known, that his title is bad or defective. I had a similar case a short time ago, in which a man agreed to buy a piece of land; he knew that there were infants who had a share in it, but he relied on their mother's promise to apply to the Court, as in fact she did apply, but without success, to obtain a valid transfer of the infants' share, and he trusted to his Proctor to see that it was obtained; and he took possession and spent his money on the land in the expectation and belief that he would shortly get a valid transfer. I considered, and I still think, that he was a "*bona fide* possessor". I have not found any definition of "*mala fide* possessor"; but I think that a man who takes possession in the mistaken belief that he has a good title, or that he is certain to obtain one, whether his mistake be of fact or of law, cannot be said to do so *mala fide*.

I think that the claim for Rs. 720 was rightly dismissed, not for the reason given by the District Judge, but because claim is prescribed; but that the case should go back to the District Court for the trial of the question whether there was such an agreement as the plaintiff alleges with the first defendant, and whether he took possession in reliance on it, and of the issues six and seven agreed upon; and for adjudication upon the claim for compensation for improvements.

The costs of this appeal should be costs in the cause.

WOOD RENTON, J.—The appellant sued the respondents, who are husband and wife, married under the Matrimonial Rights and Inheritance Ordinance, 1876, for the recovery of the sum of Rs. 720 and for damages, on the ground that the first respondent agreed to sell him for Rs. 800 of a certain land at Mudukatuwa of which she alleged herself to be the owner, received from him from time to time between 11th April, and 14th September, 1901, the abovementioned sum of Rs. 720 towards the price, and put the appellant in possession of the land in question promising to execute a valid conveyance within a few months, when her husband—the second respondent—a public servant then stationed in the Anuradhapura

Marthelis Appu v. Jayawardene

District, returned to Mudukatuwa, but failed equally with her husband to make good this promise, on payment of the balance of the purchase money.

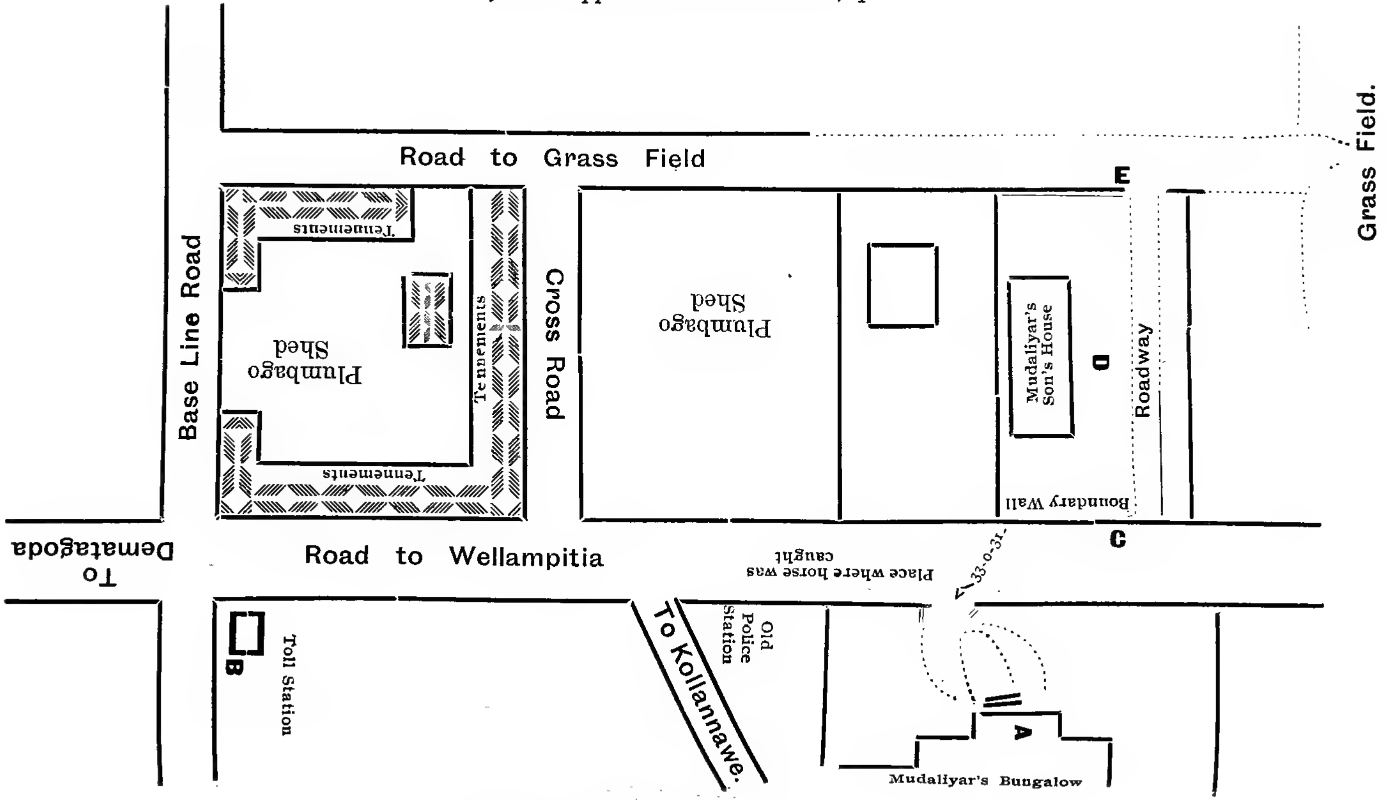
The respondents pleaded that the contract, if any, on which the appellant sued was void in law, on the grounds that it was entered into by the first respondent without the written consent of her husband, as required by sec. 8 of Ordinance No. 15 of 1876; that it was not executed in terms of sec. 2 of Ordinance No. 7 of 1840, and the claim for the recovery of the alleged consideration was prescribed. The respondents further denied the alleged agreement to sell. The first respondent admitted the receipt of Rs. 720, but said that it was consideration for the produce of the land which he was allowed to enjoy between April, 1901, and January, 1905. The second respondent alleged that this money was received by his wife without his consent or knowledge.

On these pleadings a variety of issues was framed. But the District Judge disposed of the case on one ground only. He held that the absence of the consent of the second respondent to the alleged agreement entered into by the first precluded the appellant from suing on it, and dismissed his action accordingly.

Mr. Garvin, for the appellant, contended before us (1) that even if the alleged contract by the 1st respondent was bad and unenforceable under sec. 8 of Ordinance No. 15 of 1876, and sec. 2 of Ordinance No. 7 of 1840, the money paid under it was recoverable under the Roman Dutch Law; and (2) that although on the face of the record itself it appeared that a period of more than three years had elapsed between the last payment to account (14th September, 1901) and the institution of these proceedings (2nd June, 1905), the appellant's claim was not barred by prescription, inasmuch as the cause of action in this case did not accrue to him within the meaning of sec. 11 of the Prescription Ordinance of 1871 till the formal demand for the execution of a conveyance in pursuance of the contract had been made and refused.

The agreement itself was clearly unenforceable in the absence of the husband's written consent. But I think that the money paid under it was recoverable [see *Grigoris* v. *Tilleke-*

Plan referred to in
Juan Appu v. *Sinne Swami*, p. 21.



ratne (1893) 2 C. L. R. p. 190, following C. R., Panwila, 3,713, Grenier II. (1873) p. 34]. The cause of action, however, for that money arose whenever it might have been recovered, *i.e.*, immediately on payment, and consequently, whether the case comes under sec. 8 or sec. 11 of the Prescription Ordinance it was barred at the date of institution of the present action.

I agree with my lord the Chief Justice in regard to the question of compensation, and I assent to the order that he has proposed.

JUAN APPU *vs.* SINNA SWAMI.

No. 9,726, P. C., Colombo.

Present: Hutchinson, C. J.

Argument: 11*th May*, 1908.

Judgment: 13*th May*, 1908.

Tolls—Evasion—Horse taken over a portion of road adjoining a toll station.

A person who avoids passing a toll station by taking a horse from one garden to the opposite garden over a portion of a road adjoining a toll station is not liable to pay toll for the horse, nor does he evade payment of the toll.

In this case the accused was charged under sec. 21 of Ordinance No. 3 of 1896 with having taken a horse from a road over land adjoining the toll station with intent to evade payment of toll.

The Police Magistrate of Colombo (B. Constantine, Esq.) acquitted the accused, and delivered the following judgment:

"The facts of this case are admitted. The Mudaliyar lives in the house A on the plan filed.* His son lives in the house D. To avoid the toll the Mudaliyar drives to the garden on which D stands and there leaves his carriage. The road there is a public road, and so far the Mudaliyar is within his rights.

The further question at issue is whether the Mudaliyar having left his carriage and got down at the garden D, on which he has no stable, his horse-keeper may take the horse

---

* See plan on opposite page.

Juan Appu v. Sinna Swami

across the road to the stable at A. I see no reason why he should not. He owns the land on both sides, of the road, and the toll is leviable on the vehicle which plus the horse has the right to go to the land E. Then the horse on being taken from the carriage becomes a separate entity for the purposes of the Toll Ordinance, and hence begins its journey over again, and can consequently be taken from D to A without having to pay toll.

"If the cross road marked on the plan is really a road, it would seem that anyone can evade payment of toll, and that the toll bar must be shifted; but that question does not now arise."

Bawa (with *Allan Drieberg*) for appellant.

H. J. C. Pereira (with *Prins*) for respondent.

c. a. v.

JUDGMENT.

HUTCHINSON, C. J.—This is an appeal with the consent of the Attorney-General against an acquittal. The respondent was charged under sec. 21 of Ordinance No. 3 of 1896 that, being liable to payment of toll, he took a horse from a road over land adjoining the toll station with intent to evade payment of tolls.

The toll is payable in respect of the road leading from Demettagoda to Kollanawe. This road crosses at right angles the 'Base Line Road'; and the toll station is at the point where the first road crosses the second. No toll is payable on Base Line Road. The respondent took his horse and carriage along Base Line Road, passed the toll station, then turned up a public road to his right called Grass Field Road, at some distance along which his son's house is situated, arrived at his son's house and left the carriage there, and then took the horse in a straight line across the Demettagoda-Kollanawe Road to his own house, which is on the opposite side of the road facing his son's house.

He had a right, which is not disputed, to take the horse and carriage to his son's house by the route by which he took them; and the inference is that he took the horse by that route in order to get the carriage there. I agree with

the Magistrate that when he lawfully got the horse there he had a right to take it across the road to his own house. I also think that he was never liable to payment of the toll for the horse, and, therefore, could not have intended to evade any liability. The toll is payable in respect of the use of the road; and he never used any part of the road except at the point where he crossed it from his son's house to his own. I dismiss the appeal.

WIJEYSEKERE *vs.* PERERA.

NO. 12,375, D. C., COLOMBO.

Present: HUTCHINSON, C. J., & WOOD RENTON, J.

ARGUMENT: *27th May*, 1908.

JUDGMENT: *4th June*, 1908.

Writ—Due diligence—Examination of debtor—Civil Procedure Code, secs. 219, 298 *&* 337.

The failure of a judgment-creditor to avail himself of secs. 219 and 298 of the Civil Procedure Code since the previous issue of a writ is not conclusive proof of want of diligence. Such failure only creates a presumption against the judgment-creditor.

vanLangenberg for appellant.

Bawa (with *B. F. de Silva*) for respondent.

The following authorities were cited at the argument:—Civil Procedure Code, secs. 219 and 352; *Ana Perumal Chetty* v. *M. Perera* (2 Br. p. 29); *Ephraums* v. *Silva* (6 N. L. R. p. 301); *Eliyapillai* v. *Murukesu* (10 N. L. R. p. 249); *Veerasamy* v. *Tambipillai* (4 N. L. R. p. 57); *Palaniappa Chetty* v. *Gomes* (1 N. L. R. p. 357); and *Silva* v. *Alwis* (1 A. C. R. p. 102).

c. a. v.

JUDGMENT.

HUTCHINSON, C. J.—This is an appeal by the defendant judgment-debtor from an order allowing the reissue of a writ of execution. The plaintiff obtained judgment on the 17th May, 1905; shortly afterwards a writ of execution was issued;

Wijeysekere v. Perera

there was an appeal against the judgment, which was abandoned. In December of that year writ was reissued; in September, 1906, application was again made for execution, but no affidavit in support of it was filed until September, 1907, when notice of the application was ordered to be served on the defendant. This notice was from time to time reported not served, and on the 27th November substituted service was allowed for the 18th December, on which day the defendant appeared, and on the 19th he filed an affidavit in opposition. On the 24th the order for re-issue was made.

The defendant in his affidavit alleged an agreement between him and the plaintiff and two other persons, which he said was tantamount to a final settlement of all money due by him under this judgment; and in his evidence at the hearing of the application he repeated this, and gave the names of persons who were present at the making of the agreement; but there was no other evidence in proof of it. The District Judge very properly held that there was no proof of such an agreement; he believed the statement in the plaintiff's affidavit that the whole of the judgment debt was due. The only question, therefore, was whether on the last preceding application due diligence was used to procure complete satisfaction of the judgment as required by sec. 337 of the Code. The District Judge was of opinion that due diligence had been used; and I think that his opinion was right, unless the mere fact that the plaintiff had not applied for the examination of the debtor under sec. 219, or for his imprisonment under sec. 298, must be taken as conclusive proof or as raising a presumption which has not been that he had not used due diligence.

The point was not mentioned before the District Judge, and he does not refer to it. The record shows that no application was made under sec. 219 or sec. 298, and the appellant's counsel relies on the decisions in *Palaniappa Chetty* v. *Gomes* (1 N. L. R. p. 357) and *Ephraums* v. *Silva* (6 N. L. R. p. 301). I cannot think that the Court in either of those cases meant to lay down a rule that where a plaintiff has since the previous issue of a writ not availed himself of secs. 219 and 298 his failure to do so is conclusive proof of want of diligence. If for example it appears that it was impossible for him to do

Wijeysekere v. Perera

so, or that it would have been useless, it could not be said that the failure would prove any want of diligence. The opinion expressed by Wendt, J., in *Silva* v. *Alwis* (1 A. C. R. p. 102) (a case of first application for execution of a judgment six years old), and by Wood Renton, J., in *Eliyapillai* v. *Murukesu* (10 N. L. R. p. 249) is clearly right, that the failure to take proceedings under sec. 219 only creates a presumption against the plaintiff. We must therefore look at the whole of the evidence to decide whether the failure to to take those proceedings was due to want of diligence or whether there is any other explanation of it. As Wendt, J., said in the case in 1 Appeal Court Reports, an examination of the debtor under sec. 219 may be, and under ordinary circumstances is, a means of information which a creditor is obliged to adopt; but if without that means he is able to satisfy the Court that he has used due diligence, he must be allowed to do so.

The defendant in his evidence admits that there are "a few cases" in which judgments have been entered after him which have not been satisfied. He also mentions some properties which he says he has, but the District Judge says that he thinks that any creditor would find it difficult to reach any property belonging to him. The plaint in the action was filed and summons issued in February, 1905; service was not effected, and on the 24th March substituted service was ordered; the defendant then appeared and filed answer on the 12th April; on the 17th May he applied for a postponement upon an affidavit which the Judge described as positively silly, and judgment was given. On two previous writs the plaintiff pointed out to the Fiscal properties to seize, but in each case another judgment-creditor had been beforehand. There were other unsatisfied judgments against the debtor when the plaintiff made his present application. The notice again could not be served, and substituted service had to be resorted to. Under these circumstances I do not think that the failure to have proceedings to compel this debtor to appear and be examined as to his means or to have him imprisoned proves want of diligence. To have made the attempt would probably have only been to throw good money after bad.

I would dismiss the appeal with costs.

WOOD RENTON, J.—I concur.

Abdul Rahiman v. The Colombo Munici-pal Council

ABDUL RAHIMAN *vs.* THE COLOMBO MUNICIPAL COUNCIL.

No. 27,238, C. R., Colombo.

Present: Grenier, A. J.

Argument: 14*th December*, 1904.

Judgment: 15*th December*, 1904.

Annual value—Municipal Councils Ordinance (*No.* 5 *of* 1867)—*Assessment of leased premises.*

The annual value of premises assessed must not always be determined by what a lessee pays, but by the rents and profits which the owner would derive from the premises if he let them himself.

Bawa for appellant.

vanLangenberg for respondent.

c. a. v.

Judgment.

Grenier, A. J.—I am not prepared to hold that in assessing the annual value of premises the principle that ought to be invariably followed is that the premises should not be regarded as separate tenements, but as a whole. In the majority of houses in the Pettah, although they are occupied by a number of tenants, the premises, if let as a whole, would yield far less to the owner than if let to separate tenants by the owners and he collected the rents himself. The premises in this case were leased to the defendant on an annual rental of Rs. 1,800, but that means that the lessee in order to make a profit would sublet the premises and thus pay himself the amount of the rent and have a large margin in the shape of profit. If the landlord himself let the premises and collected the rents himself, he would certainly get more than the amount he now receives from his lessee. I think the annual value of the premises must not always be determined by what a lessee who is inclined to make a profit out of the transaction pays, but by the rents and profits which the owner would derive from the premises if he let the tenements himself. In this case it seems to me that the premises would yield something over Rs. 200 a month, and the assessment by the defendant at Rs. 2,430 was in the circumstances a correct one. Affirmed.

BELL *vs.* THE COLOMBO MUNICIPAL COUNCIL.

No. 72,531, C. R., Colombo.

Present: Lawrie, J.

17*th June*, 1901.

Assessment—Proceedings for reduction—Jurisdiction—Court of Requests—Ordinance No. 5 *of* 1867, *sec.* 1; *and Ordinance No.* 12 *of* 1895, *sec.* 4.

The defendant Council assessed the annual value of certain premises at Rs. 2,400, and the rates on it amounted to Rs. 264. The plaintiff sued the defendant Council in the Court of Requests for a reduction of the amount of the assessment to Rs. 1,920. In appeal,

Held: That the Court of Requests had jurisdiction to try the action.

These were proceedings for the reduction of the assessment of the annual value of certain premises. The defendant Council assessed the annual value at Rs. 2,400, and the rates thereon in all amounted to Rs. 264. The plaintiff prayed for a reduction of the assessment from Rs. 2,400 to Rs. 1,920. The defendant Council contended that the Court of Requests had no jurisdiction to try the case, and the Commissioner (W. H. Moor, Esq.) upheld the contention in the following order: "I hold that sec. 4. of Ordinance No. 12 of 1895 gives this Court no jurisdiction to try this case; and that sec. 1 of Ordinance No. 5 of 1867 refuses this Court power to try this case. I dismiss the plaintiff's action with costs." Against this order the plaintiff appealed.

Bawa for plaintiff-appellant.

Schneider for defendant-respondent.

JUDGMENT.

Lawrie, J.:—This proceeding to have an assessment reduced seems to me to be an action within the meaning of the Civil Procedure Code, where action is defined to be a proceeding for the prevention or redress of a wrong.

The Ordinance No. 12 of 1895, sec. 4, gives the Court of Requests jurisdiction to hear and determine all actions in

Rahiman v. Amardeen

which the demand shall not exceed Rs. 300. The demand in this action does not exceed Rs. 300.

I am of the opinion that the Court of Requests has jurisdiction. I set aside, and remit for trial.

RAHIMAN *vs.* AMARDEEN *et al.*

No. 24,979, D. C., Colombo.

Present: Hutchinson, C. J., & Wendt, J.

7th July, 1908.

Mortgage bond, action on—Non-production of original bond—Dismissal of action.

The non-production of the original of the mortgage bond on which the action is based, where a duly certified copy is produced, is not a ground for the dismissal of the action without trial.

An appeal from a judgment of the District Judge of Colombo (J. R. Grenier, Esqr.), which is as follows :—

"This action by the plaintiff purports to be on a copy bond. The original has not been produced or accounted for, the plaint making reference to a copy only. In view of the action being palpably a collusive one between the plaintiff and the first defendant, who stand in the relation of father-in-law and son-in-law; as also in view of the defence stated by the second defendant, who is a perfect stranger to both of them, I required the plaintiff to satisfy me that the original of the bond was not in his possession or power. The plaintiff should have in his plaint complied with the provisions of sec. 52 of the Civil Procedure Code and made mention of these particulars; but having failed to do so, I thought that before entering on the trial of the issue as to whether the bond had been paid and satisfied or not, the plaintiff should supply the Court with proof of an essential averment that he should have made in his plaint. I gave the plaintiff two opportunities of satisfying me as to the loss, as he alleges, of the original bond; but I have no hestitation in saying that I consider his explanation of the way in which the document was lost as not only childish, but essentially false. I am

firmly convinced that the document was never lost, but that it is wilfully kept back by the plaintiff for very plain reasons, and that his present action is a fraudulent and collusive one. It is clear, that so long as I hold the opinion that the bond is still with the plaintiff, and that he is withholding it from the Court, I cannot adjudicate upon any question of fact as to payment, especially in view of the statements contained in second defendant's answer. The point is a novel one, and I have no alternative in the circumstances but to dissmiss plaintiff's action with costs. I think I am justified, however, in taking this course under sec. 140 of the Civil Procedure Code, because I find as a fact that the original bond is in the actual power and possession of the plaintiff, and he practically refuses to produce it by interposing false and frivolous excuses for its non-production."

H. A. Jayawardene for plaintiff-appellant:—The Judge mistakes the case for one where a lost negotiable instrument is in question.

The certified copy is as good as the original. [See *Rang Menika et al.* v. *Punchi Menika et al.* (1 S. C. R. p. 266); and Evidence Ordinance, secs. 65 (5) and 79.]

Even if endorsement on the bond is proved, it is not conclusive proof of payment.

Balasingham (*W. H. Perera* with him), for second defendant-respondent, relied on sec. 50 *et seq.* of the Civil Procedure Code.

JUDGMENT.

HUTCHINSON, C. J.—We think the case should go back for trial upon the issue agreed upon by the parties. The absence of the original of the mortgage bond at the trial may be a strong circumstance for the Judge to take into account, if he thinks, that the plaintiff has got the original or knows where it is; but its non-production is not a ground for dismissing the action without trial. Costs of the appeal to be costs in the cause.

WENDT, J.:—I agree.

Kalu v. Lami

KALU *vs.* LAMI.

No. 697, D. C., Kurunegalle.

Present: Layard, C. J., & Moncrieff, J.

14*th February*, 1905.

Kandyan Law—Acquired property of deceased husband—Right of widow.

A Kandyan widow is entitled to a life-rent in the property of her husband both acquired prior to her marriage and during the continuance of her marriage.

van Langenberg for appellant.

H. A. Jayawardene for respondent.

JUDGMENT.

Layard, C. J.—The only question raised in this appeal is as to whether Kalu, the appellant, is entitled to retain possession of all the acquired property of her deceased husband, or whether her right of retention is limited to property acquired by her husband during his marriage with her.

With regard to the right of a Kandyan widow to her deceased husband's lands, Armour lays down as follows: "If the deceased husband left other landed property besides his *paraveny* or ancestral lands, that is to say lands acquired by purchase, or lands which he, the deceased, had received from his adopted father, in such case the widow may have possession of the whole of such acquired land for the remainder of her life provided she remain single." As far as that passage of Armour goes, no distinction is drawn between the land acquired by the husband prior to his marriage and lands acquired by him subsequent to his marriage; and neither appellant's counsel nor respondent's counsel has been able to lay before us any case in which it was distinctly laid down by this Court that the retention by the widow was limited to lands acquired by her husband during the marriage. The first case to which we have been referred is one reported in Ramanathan's Reports for 1861, page 112, which merely lays down the general principle of the right of possession with respect to lands the acquired property of her husband, viz.,

Kalu v. Lami

that the widow was entitled to a life estate therein. The Full Court in that judgment does not draw any distinction between lands acquired prior to the marriage of the deceased husband and his widow and land acquired during the continuance of the marriage. That case, however, is followed by a subsequent judgment of this Court reported in Ramanathan's Reports, 1863-1868, in which three Judges, two of whom sat in the former case, say, with respect to landed property acquired during the marriage, her rights are different, as is pointed out in the judgment in the case I have above referred to. Now, reading the first judgment, as I have said before, it draws no distinction between lands acquired prior to the marriage; and lands acquired during the continuance of the marriage, and the Judges in the later decision do not state why they considered that the former decision referred only to landed property acquired during the marriage, neither do they lay down the general principle that landed property acquired prior to the marriage is not such as the widow would have a right of retention over. We are capable, as those Judges were, of judging what the meaning of the words in the original judgment of 1861 is; and certainly I cannot say that the opinion expressed in the earlier judgment is limited to landed property acquired during the marriage, as suggested by the Judge in the later decision. We have also been referred to the judgment in the case of *Menika* v. *Horatala*, reported in 3 S. C. R. p. 167. Sir Archibald Lawrie, then Acting Chief Justice, said as follows: "I do not find authority of a kind which I think sufficient that the widow's possession of acquired land was to come to an end on a second marriage; one reason why she was allowed it for her life was that in most cases it had been purchased by the savings and exertions of the wife as much as of the husband." There he does not limit the widow's right to the possession of land acquired during the marriage; but he merely gives as one of the reasons why she was allowed to possess such land, that in most cases not in all, it had been purchased by the savings of the wife as much as of the husband. This does not amount to a judging on the part of Sir Archibald Lawrie that the widow's right of retention was limited to the possession of land acquired during the second marriage. There is another case

Kalu v. Lami

in which Sir Archibald Lawrie gave a judgment, which is reported in 5 N. L. R. p. 177. That case only dealt with lands acquired after the marriage. In the course of that judgment he says that the action was premature, because the defendant was entitled to a life-rent of the property acquired by her husband during their marriage. The point to be decided in that case was not whether the defendant was only entitled to a life-rent of the property acquired by her husband during their marriage, or whether she would be entitled to a life-rent of the whole of her husband's acquired property. All that was in issue in that case was property acquired by her husband during their marriage; and there was no question raised for decision as to a widow's rights in respect of property acquired prior to the marriage; and it cannot be said that the acting Chief Justice intended to lay down that widows had no right to retention of property acquired by their husbands prior to their marriage. The question was not before him, and consequently he did not decide it. As we can find no actual ruling of this Court reducing the right of a widow to the possession of only land acquired during the marriage, we think that we must follow the general rule laid down in Armour, that if the deceased in addition to his ancestral property left acquired lands, the widow will have the possession of the acquired lands in their entirety for the remainder of her life.

The ruling of the District Judge on the question must be set aside, and the appellant is entitled to the costs of the contention in the Court below and of this appeal.

MONCRIEFF, J.—Agreed.

PERERA *vs.* SILVA.

No. 1,047, P. C., Kalutara.

Present: Layard, C. J.

23rd October, 1905.

False information given to public officer—Complaint to a subordinate public officer—Ceylon Penal Code, sec. 180.

Where the information (which was alleged to be false) was given to a public servant who was only a subordinate officer and one he could not, without reference to a higher authority, exercise any power which would cause injury to the complainant,

Held: That no offence under sec. 180 of the Ceylon Penal Code was committed.

Dornhorst, K. C. (with *H. J. C. Pereira & Allan Drieberg*) for complainant-appellant.

Walter Pereira, K. C. for accused-respondent.

Judgment.

Layard, C. J.—The charge against the accused is, that he did "in a letter, bearing date 28th December, 1904, inform a public servant, to wit, the District Traffic Superintendent, Mr. W. L. Fryer, that the complainant did on the 21st and 27th of December last cause inconvenience to the accused by delaying the delivery to the accused of consignments of ice which arrived on the said dates by the 8-30 a.m. train at the Kalutara North Station, which is under the control of the complainant, and that the complainant on the said dates, after the arrival of the said consignments, was engaged in reading the newspapers, and did not permit the accused to remove the said consignments until 9-56 a.m. on the 21st December, and until 9-30 a.m. on the 27th December."

Complainant then alleged that the information was false and that the accused gave the same to the District Traffic Superintendent knowing the same to be false and intending to cause or knowing it to be likely that he would thereby cause the said Traffic Superintendent to use his lawful power to the injury or annoyance of the complainant, and that the

Perera v. Silva

accused thereby committed an offence punishable under sec. 180 of the Ceylon Penal Code.

The public servant who was informed in this case was a District Traffic Superintendent, who is only a subordinate officer in the Ceylon Railway Department; and it is admitted that he cannot exercise any power, without reference to a higher authority, which would cause injury to the complainant. It appears from the evidence that the District Traffic Superintendent did in the course of his duty make inquiry into the complaint made by the accused against the complainant, but it is further admitted that after such inquiry he cannot do any act which would be injurious to the complainant. It was decided in the Madras Court in the case of *Regina* v. *Periannan*, reported in 4 Indian Law Reports (Madras Series) p. 241, that it would not be an offence under this section if the public servant to whom the information was given, as in this case, was only competent to pass on the information to his superior and cannot act directly or immediately against the person informed against. As pointed out by Mr. Justice Lawrie in the case reported in Koch's Reports, p. 281, Mayne, in his Treatise on the Penal Code, throws some doubts on this decision. Mayne, however, concedes that "no offence is committed if the false information is given to someone who is under no legal obligation to to take any action on it". I am inclined to follow the ruling of Mr. Justice Lawrie, which appears to me to rightly follow the decision of the Madras Court, because I think that the language of sec. 180 is not open to any other construction. I would, however, if the appellant's counsel desire, have reserved this case for the decision of two Judges, but the appellant's counsel, though he argued that the provision of sec. 180 covers this case, says that he is not convinced that the judgment of Mr. Justice Lawrie or of the Madras Court are absolutely wrong, but does not desire that I should reserve this case for a bench of two Judges. As I do not consider that the conduct of the accused has rendered himself liable to punishment under sec. 180 of the Penal Code, I dismiss the appeal. At the same time, as the complainant is a public officer who, I understand, has been directed by superiors to bring this charge against the accused, I desire to record that I have arrived

at this conclusion purely on the question of law raised by Mr. Pereira on behalf of the respondent, and that I have formed no opinion as to whether the appellant's conduct in the matter complained of by the accused was irregular or whether the accused had any just cause of complaint against the appellant.

COSTE *vs* ABEYAKOON.

No. 12,705, C. R., CHILAW.

Present: HUTCHINSON, C. J.

2nd July, 1908.

Landlord and tenant—Small Tenements Ordinance (No. 11 *of* 1882)—*Improvements effected by tenant—Possession by tenant till compensated.*

A tenant can retain possession of the property let to him by his landlord until compensated for improvements, which have been made by agreement, only when it is an express or implied term of the agreement that he shall be entitled to keep possession until he is paid for them.

Chitty, for appellant, cited *Don Michael Amarasinghe* v. *Sego Abdul Kader* (2 Br. p. 397); *Mudiyanse* v. *Sellandyar* (10 N. L. R. p. 12); and *Tikiri Banda et al.* v. *Gamegedera Banda* (3 S. C. C. p. 33). The present case is stronger still, because improvements were made by request. [C. J.: Your claim is on contract, so separate action is necessary on that contract.] There has been no "legal determination" of the tenancy, inasmuch as the right to compensation must first be satisfied.

Balasingham, for respondent, was not called upon.

JUDGMENT.

HUTCHINSON, C. J.—This is a proceeding by the landlord under Ordinance No. 11 of 1882 to recover possession of a house from his tenant. The first defence was that the tenancy had not been properly determined by a notice to quit. That issue was decided by the Commissioner first. He decided that the notice given by the plaintiff was sufficient, and I

Coste v. Abeyakoon

think that decision was right. The appellant does not seriously contest it. The other point was, that the tenant alleged that he made improvements on the premises at the request of the landlord, and that he is entitled to compesation from the landlord for those improvements, and that he had a right to retain possession until he was paid compensation, and that, therefore, the tenancy had not yet expired.

The Commissioner was of opinion that a claim to compensation for improvements cannot be set up in a proceeding under Ordinance No. 11 of 1882. I have to decide whether that defence is a valid defence or not, *i.e.*, to say whether defendant is entitled to keep possession until he is compensated. He puts his claim on the ground that he had an agreement with his landlord to make improvements. The cases which were referred to in the Court of Requests and to-day were cases in which it was held that a man is entitled to compensation for his improvements which he had made at a time when he believed that he was in possession under a valid lease of the property to himself, *i.e.*, he made the improvements whilst he was a *bona fide* possessor. When it turned out that his lease was invalid and the real owner took proceedings to eject him he was held to be entitled to keep possession until he was compensated for those improvements.

The present, of course, is quite a different case. It is a case of an agreement made by a tenant with his landlord that he shall make some improvements. If it is an express or implied term of the agreement that he shall be entitled to keep possession until he is paid for them, he will have such a right but not otherwise, and this defendant has not alleged that there was such an agreement either express or implied. In my opinion there is no valid defence shown to the landlord's application, and I think the appeal should be dismissed with costs.

SARVAI *vs.* MURRAY

Sarvai v. Murray

No. 18,556, D. C., Colombo.

Present: Layard, C. J., & Moncreiff, J.

7th December, 1904.

Fiscal—Unlawful discharge of debtor from custody—Extent o liability—Payment of subsistence money—Detention on credit—Sec. 315 *Civil Procedure Code.*

The amount of the liability of a Fiscal for wrongfully discharging a debtor who is in his custody must be estimated by charging him with the whole debt. The *onus* of proving that the creditor would have recovered less is thrown on the Fiscal.

In estimating the value of the custody of the debtor to his creditor account may be taken, not only of his own resources, but of all reasonable probabilities founded upon his position in life and surrounding circumstances that the debt or any portion of it would have been recovered by pressure put on him by imprisonment.

There is nothing in sec. 315 of the Civil Procedure Code which prevents the Fiscal from detaining a debtor on credit, or which invalidates the committal, if he accepted a particular month's allowance on the 2nd of that month.

The following is the judgment of the District Judge of Colombo (F. R. Dias, Esq.), delivered on the 22nd of February, 1904:—

"This is an action against the Fiscal of Colombo for damages sustained by reason of his unlawfully releasing from custody a debtor who had been committed to jail under the plaintiff's writ by this Court. The plaintiff obtained a decree against the man for Rs. 1,000 and interest thereon at 9 per cent. and costs on the 8th December, 1902. The amount of the decree not being paid, he had his debtor arrested and committed to jail on the 6th March, 1903, and at the same time paid the defendant Rs. 7·50, being the subsistence allowance of the prisoner for a month. On the 2nd April he again paid the defendant Rs. 15 for another two months, which should have kept the prisoner till the 5th June. But on the 5th May the defendant released him from custody.

"In his answer the defendant does not pretend in any way to justify the discharge, but says that it was entirely due to a

Saivai v. Murray

mistake. At the trial, however, his counsel put forward the ingenious theory that at the date of the discharge the debtor was not in the lawful custody of the Fiscal, and so the discharge was not unlawful, and also that he had acted under a proper order of this Court.

"It was urged that, under sec. 315 of our Code the monthly subsistence allowance had to be supplied to the Fiscal before the first day of each month, and inasmuch as the full April allowance had not been supplied before the 1st of that month the further detention of the man became illegal. This is nothing more than an idle quibble. The question as to the depositing of the subsistence money is one that affects the commissariat arrangements of the Fiscal's Department, and there is nothing in the Code which says that the Fiscal may not detain a debtor on credit if he chose to do so, or that if he accepted a particular month's allowance on the 2nd of that month the committal became invalidated. Even if there be any sense in this argument, I think it is sufficiently met by the reply that the defendant is estopped by his own conduct in denying the legality of the payment made to him on the 2nd April, which he accepted and acted upon. Further, the defendant's own officer, Mr van Rooyen, has clearly demonstrated that such an agreement was impossible.

"According to him the Fiscal will never accept less than a full month's allowance, reckoning the month from the date of committal till the corresponding date of the next succeeding month, and no discharge will be made except upon an order of Court obtained upon failure by the detaining creditor to deposit a further month's allowance on or before 12 noon of the day before the last mentioned date. Thus, according to the facts admitted the defendant was on the 6th March provided with sufficient funds to keep the debtor till the 5th April, and three days before the last date of that period, viz., on the 2nd April, he was paid the proper allowance for a further two months, viz., to the 5th June. The debtor was, therefore, in lawful custody during the whole of April, and he ought to have been kept in such custody during the whole of May, and hence his discharge on the 5th May was wholly unwarranted and illegal.

"The plea that the debtor was discharged under a *bona fide* mistake of fact on the part of the defendant as regards the exhaustion of the subsistence allowance in his hands affords no defence at all. *Sarvai v. Murray*

"Such a mistake ought to be impossible in a properly regulated public department like the Fiscal's; and if one does occur, it must of necessity be attributed to gross negligence on the part of the subordinate officer in charge of that particular branch of the Fiscal's Office. No one expects (and it would be unreasonable to expect) a high officer like the Fiscal of Colombo personally to examine the books and see how many rupees or cents are still left to the credit of each prisoner in his charge before applying to the Court for an order of release; but in law he is bound by the acts or negligence of his subordinates.

"That a serious irregularity was perpertrated in the present instance there is no room whatever to doubt. It would seem that on the 4th May, in the usual course of business, the Fiscal's signature was obtained to an official letter addressed to this Court asking for permission to discharge the prisoner because the subsistence money would be exhausted next day. On that same day, 4th May, this Court sent the stereotyped reply in the following terms: 'In the event of no further batta being deposited before 12 noon of the 5th instant the debtor in question may be discharged from custody.'

"This was in no sense an order of discharge which would give the Fiscal absolute immunity from liability. It was no more than a qualified permission given him to act in a certain way, provided certain circumstances existed. But these circumstances did not exist, and so the permission was no permission at all.

"How this particular irregularity was occasioned it is not for me to enquire, and I have no doubt but it has already been investigated departmentally. There is, however, room for doubting that it was quite accidental.

"The only substantial question in this case is the measure of damages to be awarded to the plaintiff. It has been urged that the debtor was a man without property, and the proper measure of damages being the value to the creditor of the

Sarvai v. Murray

custody of the debtor at the time of his release, the plaintiff was entitled to nothing (*P. R. Carpen Chetty* v. *P. W Conolly* 4 S. C. C. p. 33). The case cited by the defendant's counsel does not bear the construction attempted to be put upon it by him. It does not profess to say that the custody of such a debtor must *ex necessitate* be of no pecuniary value to the creditor, but rather the contrary. It has some value, and that is exactly what the Court has to ascertain from the circumstances of each case. In the case of *Macrae* v. *Clarke* (1 L. R. C. p. 406) it has been laid down that a jury, in estimating the value of the custody of a debtor to his creditor, may take into account, not only the debtor's own resources, but all reasonable probabilities, founded upon his position in life and surrounding circumstances, that the debt or any portion of it would have been recovered by the pressure put on him by imprisonment. Whether he will obtain payment by such means is in all cases problematical; and, therefore, evidence of the position of the debtor, and of his friends and relatives, so far as they affect that probability, is admissible. In that case there was evidence of a composition of six shillings in the pound having been offered in payment of the debt, and that the debtor's father was wealthy and a hundred years old, both of which facts the jury were permitted to take into account. The present is almost a parallel case, and the evidence proves that the debtor is the son-in-law of a very wealthy man. They were haggling over the settlement of the plaintiff's claim from the time of the arrest, and starting with an offer of Rs. 400 had came up to Rs. 800 about ten days before the discharge took place. The debtor was a shop-keeper in Colombo, and had several lands in his village, Beruwela, which, according to the debtor's own witness, the headman, he recently transferred in favour of his wife, his father-in-law, and others. What has become of his Colombo business, or if he had any property here, we are not told. Under the circumstances it seems to me that the reasonable probability was that a little further pressure of confinement at Hultsdorp would have effectually secured to the plaintiff the full amount of his claim. It was highly unlikely that the wife would have consented go on living comfortably on the income of the lands transferred to her while her

husband was wasting away in jail on 25 cents' worth of cunjee a day, nor would the rich father-in-law have delayed much longer to save his daughter from that degradation. *Sarvai v. Murray*

"Even if we are not justified in having any such assumptions, I think I am bound to follow the rule laid down by Sir John Romilly, Master of the Rolls, in the case of *Moore* v. *Moore, in re Mozley* (25 Beaven's Reports 8). It was there ruled that the principle on which the amount of the Sheriff's liabilily for an escape was to be ascertained by charging him with the whole debt due, and throwing on him the *onus* of proving that less would have been recovered if the prisoner had remained in custody. The defendant has not discharged that *onus*, and the plaintiff is therefore entitled to recover the whole sum due to him from his debtor. No evidence has been called to prove what the full amount of the claim and costs in the other case amounted to up to the date of the discharge, but there is evidence to show that the plaintiffs would have compromised his whole claim for Rs. 1,000 at that date.

"I would therefore enter judgment for plaintiff for that sum with legal interest thereon from date of this action and costs.

vanLangenberg for defendant-appellant.

Dornhorst, K. C. (with *F. M. de Saram*) for plaintiff-respondent.

JUDGMENT.

LAYARD, C. J., & MONCREIFF, J.—Affirmed.

Kiri Banda v. Dingiri Menika

KIRI BANDA *et al.* *vs.* DINGIRI MENIKA.

NO. 8,553, C. R., KEGALLE.

Present: WENDT, J.

29th July, 1908.

Absence of defendant—Court of Requests—Default to file answer—Ordinance No. 12 *of* 1895, *sec.* 8, *sub-secs.* 2 *&* 3.

Sub-sec. 2 of sec. 8 of Ordinance No. 12 of 1895 covers the case in which a defendant having obtained time till a later day for presenting his answer fails to appear on that day or to excuse his absence.

Sub-sec. 3 empowers the Court on being satisfied as to the cause of defendant's default to set aside the judgment and admit the defendant to proceed with his defence.

Allan Drieberg for appellant.

Morgan for respondent.

JUDGMENT.

WENDT, J.—This is an appeal against the order of the Commissioner dated the 19th March, 1908. It was in these words: "I cannot alter the order of 19th December, 1907." I take the plain meaning of this to be, that in the opinion of the Commissioner he had not the power to alter that order. The order was an order directing that judgment be entered for the plaintiff for default by the defendant. The claim was a money claim, and on the 13th of December, the returnable day of the summons, the journal entry is: "Defendant absent. Summons served. Answer on 19th."

If the defendant was absent the Court should have proceeded to enter judgment for the plaintiff, unless it thought fit to require evidence from him. The defendant, however, in her affidavit of the 23rd December, deposes that she appeared on the 13th and obtained time till the 19th to file her answer. This is probably the truth, and the journal entry a mistake. In view of the repeal of sec. 823 of the Civil Procedure Code by Ordinance No. 12 of 1895, the only provisions applicable to the case appear to be sub-secs. 2 and 3 of sec. 8, the new section substituted by the later Ordinance. I

think sub-sec. 2, which provides for the absence of the defendant on the returnable day of the summons or upon the day fixed for the hearing of the action, covers the case in which the defendant having obtained time till a later day for presenting his answer fails to appear on that day or to excuse his absence. That being so, sub-sec. 3 empowers the Court upon being satisfied as to the cause of defendant's default to set aside the judgment and admit the defendant to proceed with his defence. Instead, therefore, of declining jurisdiction the Commissioner ought to have dealt with the cause shown by the defendant, and in order that he may now do so I set aside the order of 19th March, 1908, and send the case back for further proceedings.

Both parties will be at liberty to put forward any further material they may desire. As the appeal has been necessitated by the action of the Court, I will leave the costs of the appeal as costs in the cause.

ISMAIL *vs.* BROCHER.

NO. 16,790, C. R., KANDY.

Present: HUTCHINSON, C. J.

ARGUMENT: *5th August*, 1908.

JUDGMENT: *18th August*, 1908.

Letting and hiring—Hire of bicycle—Liability of hirer.

When a hirer of bicycles hires one out he impliedly undertakes, if there is no express stipulation on the point, and nothing inconsistent with such an undertaking, that it is fit for the purpose for which he hires it out.

H. A. Jayawardene for appellant.

Allan Drieberg (with him *A. St. V. Jayawardene*) for respondent.

c. a. v.

Ismail v. Brocher

JUDGMENT.

HUTCHINSON, C. J.—The defendant hired from the plaintiff, who describes himself as a bicycle repairer and hirer at Kandy, a bicycle for ten days, paying for the hire of it Rs. 15; and the action is brought for the return of the bicycle or its value and damages for its detention. The defence was that the defendant hired the bicycle for a long journey, and that he told the plaintiff so and told him that the bicycle must be in good repair; but that it was in bad repair, and that in consequence of its defects he was obliged to leave it at Trincomalee and was put to considerable expense; and that he had sent for it, and would deliver it to the plaintiff when it arrived; and he claimed in reconvention the expenses to which he had been put in consequence of the bicycle's unfitness for the journey for which he hired it.

The Commissioner found that the defendant's allegations were proved; he dismissed the action, directing that the plaintiff should be at liberty to take away the bicycle, which was then in Court; and he awarded the defendant damages on his claim in reconvention. The plaintiff appeals.

The agreement for the hiring was on a printed form, which merely says that the defendant takes the bicycle on hire for ten days "on condition that I pay for all damages to machine by accident or otherwise". This condition does not seem to be material for the purposes of this action, because in this action no claim is made by the plaintiff for damages to the machine. The plaintiff's counsel however contends that it shows that the intention of the parties was that the defendant was to hire the bicycle with all its faults and defects, if any, and that he was to have no claim against the plaintiff if it turned out to be faulty or defective. I do not think that such an intention can be inferred from the condition. The plaintiff is a man who repairs and hires out bicycles; when he hires one out he impliedly undertakes, if there is no express stipulation on the point, and nothing inconsistent with such an undertaking, that it is fit for the purpose for which he hires it out.

I dismiss the appeal with costs.

SAIBO *vs.* SAIBO.

Saibo v. Saibo

NO. 6,116, C. R., COLOMBO.

Present: GRENIER, A. J.

ARGUMENT: *26th June*, 1908.

JUDGMENT: *2nd July*, 1908.

Promissory note—Due presentment—Proof.

The promissory note on which the action was brought was made payable at the Bank of Madras in Colombo, and the plaintiff, to prove that it was duly presented, relied on an endorsement on the note, which was as follows: "No intsructions at the Bank of Madras, Colombo. Noted for non-payment. Colombo, 10th January, 1907. L. B. Fernando, Notary Public." There was no oral evidence led to prove due presentment.

Held: That the endorsement by itself did not amount to legal proof of presentment.

vanLangenberg for appellant.

Wadsworth for respondent.

c. a. v.

JUDGMENT.

GRENIER, A. J.—The simple question in this case is, whether the promissory note sued upon was presented on the due date at the Bank of Madras, which was the first issue. There were two other issues framed by the Commissioner, which were decided in favour of the plaintiff. The note was made in favour of one Goola Mohideen Miken, by whom it was endorsed to the plaintiff. The plaintiff was the holder in due course. The defendant pleaded payment to Goola Mohideen Miken, but the Commissioner held that the defendant had failed to prove such payment. The note was made payable at the Bank of Madras, and the plaintiff relied on an endorsement on the note, which runs as follows, to prove presentment: "No instructions at the Bank of Madras, Colombo. Noted for non-payment. Colombo, 10th January, 1907. L. B. Fernando, Notary Public." There was no oral evidence led to prove due presentment. Clearly the endorsement by itself did not amount to legal proof of presentment. The Notary should

Banda v. Mohotty Hamy

have been called to prove that he went to the Bank of Madras on the due date, and that the note in question was there, and that the defendant did not come and retire it, or the plaintiff should have called some responsible Bank official to prove that the note was in the Bank on the due date and that the defendant did not retire it. I must say that the plaintiff was to blame for not placing proper evidence before the Court in proof of the presentment, but I for one will not allow what has been found to be a just claim to be defeated by an objection which at the most is only a technical one. It is clear that the defendant at no time paid and retired the note, and in these circumstances I think it right to give the plaintiff an opportunity to prove presentment on terms. If within ten days of this record being received in the Court below the plaintiff pays the costs therein incurred and of this appeal, the order appealed from will be reversed and the plaintiff allowed an opportunity of proving due presentment. If he fails to fulfil these conditions, the appeal will stand dismissed.

BANDA *vs.* MOHOTTY HAMY.

NO. 9,993, P. C., RATNAPURA.

Present: WITHERS, J.

11*th September*, 1894.

Giving false information to public officer—Public officer as contemplated by the section—Enquirer into deaths—Ceylon Penal Code, sec. 180 *—Judgment—Criminal Procedure Code* (*Ordinance No.* 3 *of* 1883, *sec.* 372).

An enquirer into deaths is not a public officer within the meaning of the section.

The particular public servant to whom false information is given must be empowered by virtue of his office to do something to the direct and immediate injury of the person informed against.

The words "I convict accused of the charge laid" do not constitute a judgment in accordance with the provisions of sec. 372 of the Criminal Procedure Code.

de Sampayo for appellant.

JUDGMENT.

Banda v. Mohotty Hamy

WITHERS, J.—The accused has been sentenced to undergo six months' rigorous imprisonment for an offence under the provisions of sec. 180 of the Penal Code.

This sentence, in my opinion, cannot be supported. First of all there is no proper judgment on which it is based. The words "I convict accused of the charge laid" do not constitute a judgment in accordance with the provisions of the 372nd sec. of the Criminal Procedure Code. Then the evidence does not support the charge. According to the charge the information given by the accused to a public servant which he knew or believed to be false was that one Siman Hamy committed theft from his (accused's) house of a gun and other property. The complaint to the public officer concerned is that two people, named Siman Hamy and Kiri Ettene, did on the 29th May forcibly enter accused's house and remove therefrom a brass basin, a gun, two mammoties, and two katties, and committed michief by pelting stones on complainant's roof, and voluntarily caused hurt to the accused.

There is nothing there about the commission of theft. The public servant himself deposes that the information given to him by the two was that one Gira and one Siyan Hamy entered the accused's house, broke the tiles, and took away certain things. There is nothing there said about the commission of theft. This witness speaks of the removal and alleged theft, but that may be his view of regarding it. It is not the language of the accused, whose brother is the said Siyan Hamy. But the main reason for setting aside the conviction is that the information was not given to a public servant capable of his using his *lawful* power to the injury or annoyance of any person. For I take the words of this section to mean that the particular public servant to whom false information is given must be empowerd by virtue of his office to do something to the direct and immediate injury of the person informed against. The public servant in this case is an enquirer into deaths. His duty is to enquire into deaths, and his power are commensurate with and limited to those duties. He could procure the attendence or even the arrest

Pieris v. Kankani

of a person suspected of being concerned in a death and the exercise of his powers against the person whom he had summoned or arrested on false information of suspicious circumstances relating to a sudden or violent death would be to the direct injury or annoyance of the person so summoned or arrested. He had no lawful power to exercise against Siyan Hamy or Kira on account of the offences laid before him to their charge by the accused. He could not lawfully have them summoned before him or arrested: it might be his duty to pass on that information to others who could lawfully procure their attendance by a summons or warrant, but that might be the duty of a private as of a public person.

DIAS *vs.* VON POSSNER.

No. 22,935, D. C., Colombo.

Present: Hutchinson, C. J., & Wood Renton, J.

Argument: *25th June*, 1908.

Judgment: *1st July*, 1908.

Costs, prospective—Inclusion of such costs in writ—Practice.

A writ of execution is not bad, because it includes a sum for "prospective costs".

The practice of including such costs in the amount covered by the writ is a reasonable one, and ought not to be disturbed.

Tambyah for appellant:—The writ has issued for a portion of the costs untaxed, that is, the Secretary has not certified certain items as taxed. The items marked "prospective costs" are irregular [*Fernando* v. *de Silva* (2 N. L. R. p. 223)]. The writ being for incorrect amount is bad [*In the matter of the Insolvency of Nadoris Tillekeratne* (1 Tam. Rep. p. 30)]. Also cited:

Karuppan Chetty v. *Anthonayaka Haminc* (5 N. L. R. p. 300).

Jayatilleke v. *Ango Hami* (4 S. C. C. p. 82).

Garvin for respondent:—The authorities cited do not apply.

c. a. v.

JUDGMENT.

Hutchinson, C. J.—This is an appeal by the judgment-debtor (plaintiff in the action) from an order directing a sale under a writ of execution issued against him to be carried out. He had applied to the District Court to recall the writ and stay proceedings pending the decision of the matter referred to in his affidavit in support of his application; but the District Court refused the application, and made the order now under appeal. The "matter referred to in the affidavit" was a complaint by the appellant against his Proctor, which did not affect the judgment-creditor. Upon the materials before the District Court the order appealed against was right.

Dias v. von Possner

On the hearing of the appeal a fresh reason was urged for the recall of the writ. It is said that the writ was bad because it includes a sum for "prospective costs." The decree in the action was that the appellant should pay to the respondent his taxed costs of the action. The bill of costs was taxed; below the signature of the Secretary is his certificate on the bill that it is "taxed at Rs. 271·37½, costs incurred"; and on the same sheet of paper there are several items headed "prospective costs" that are ticked off by the Secretary, who seems to have approved of Rs. 54·50 in respect of them, and has initialled that sum at the end of the whole bill. The writ of execution is not on the file, but the formal application for it is, and it appears from it that the judgment-creditor applied for a writ to recover Rs. 325·87½ for costs; and the respondent does not dispute that the writ in fact included, besides the Rs. 271·37½, the further sum of Rs. 54·50 in respect of "prospective costs".

The prospective costs in this bill are charges for stamps on the writ, instructions and application for issue of writ, and other charges in connection with the writ. They are costs which had not been incurred at the time when the bill was taxed; which would not be incurred if the judgment-debtor promptly paid the amount of the bill as taxed; but which would necessarily be incurred if he did not do so and if writ of execution was issued. Counsel have told us, and the Secretary of the District Court has confirmed them, that it is the regular practice in the District Courts to include items for such prospective costs in a writ of execution. There is no law which either authorises or prohibits it. In *Fernando* v. *de Silva* (2 N. L. R. p. 223), Lawrie, J., referred to it as an "inveterate custom" to put prospective costs in every bill and a "universal practice" for the taxing officer to tax them, and said that, if the matter should come before them, they would scrutinize strictly a practice which at first sight seems unjustifiable by the Code; and Bonser, C. J., assented. The practice does not seem ever to have come up before this Court since that date (1896) until now.

Now that it has come before us, I think we should decline to upset a practice which has been so long established,

Dias v. von Possner

which is not forbidden by, or inconsistent with, any enactment, and which seems to be most convenient in the interest of both the creditor and the debtor. The reason why the practice is now attacked is, perhaps, not because the appellant thinks it is wrong, or causes any hardship to anyone, or has caused any wrong, or hardship to him in his case, but because an attack upon it is the only means he has of getting this writ set aside. It certainly is convenient to include in a writ the costs of its execution.

The appeal, I think, should be dismissed with costs.

WOOD RENTON, J.—The appellants sued the respondents in the District Court. Judgment was given against him on February 4, 1907. It was affirmed on appeal in October, 1907. On 18th February, 1908, writ issued against his property, and his household furniture was seized. On 28th February the appellant's then Proctors filed his affidavit and moved for the recall of the writ. The sale, which was fixed for the following day, was stayed, and the case stood over for 27th March for settlement. There were further postponements on 27th March, 3rd April, and 6th April; and then on 7th April we find the following entry: "Case called. The Fiscal to be directed to carry out the sale." Against that order the present appeal is brought. The petition of appeal states that it was "without any inquiry or discussion". We cannot assume that such was the case. The District Judge had in any event before him the appellant's affidavit in support of the motion for the recall of the writ. The only ground on which he relied there was that his own Proctor, in spite of a distinct understanding that this should be done, had failed to give him notice of the taxation of the bill of costs in the action. Such an omission might amount to negligence as between the appellant and his Proctor. But it could not prejudice the position of the successful party, inasmuch as the appellant's Proctor was actually present at the taxation. On the materials before him the decision of the District Judge was right. But Mr. Tambyah urged a fresh ground of appeal before us. He contended that the writ itself was bad since it included prospective costs; and in support of this argument he referred to the case of *Fernando* v. *de Silva* [(1896) 2

Dias v. von Possner

N. L. R. p. 223] in which Lawrie, J., with the concurrence of Bonser, C. J., made use of the following language: "We notice that the bill (of costs) contains charges for work which confessedly has not been done. The appellant's Counsel said that it was an inveterate custom to put prospective costs in every bill, and that these were by universal practice taxed by the taxing officer. We were not referred to any authorities for this practice. Should the matter hereafter come before us, we shall scrutinize strictly a practice which, at first sight, seems unjustifiable by the Code." This *obiter dictum* would seem, however, to have been powerless to eradicate the inveterate custom which it condemns; for Mr. J. B. Misso, the Secretary of the District Court of Colombo, who taxed the bill of costs in the present case, informs us that it is the invariable practice in the Court to allow the prospective costs of execution—after having been checked by the taxing officer—to be included in the amount for which the writ is issued. These costs are not taxed in the proper sense of the term, for they have not been incurred, but they are levied, and only such of them as are actually incurred are paid. The bill of costs in the present case shows that they are costs which will be incurred if the execution proceeds. The judgment-debtor can at any moment diminish their amount by paying what is due under the decree up to date. I confess that I think that the practice of including such costs in the amount covered by a writ of execution is a reasonable one, and that we ought not to disturb it. The alternative would be the issue of a supplementary writ, or, for that matter, of supplementary writs, for the recovery of the costs of execution as they were actually incurred—an alternative certainly not to the advantage of the judgment-debtor. Sec. 224 (h) 9 of the Civil Procedure Code provides for the inclusion in the application for execution of the decree of "the amount of costs if any awarded". The decree, according to Form 41, orders "that the said——do pay to the said—— his costs of this action as taxed by the officer of the Court with interest thereon at the rate of——from the date of taxation to the date of realisation". The form of application for execution under sec. 224 Form 42 under the heading in the table of particulars, "amount of costs if any awarded", expressly includes

costs "subsequently incurred" as distinct from the "costs as awarded by the decree". The writ of execution itself (Form 43) directs the levy of the "sum of Rs.——which the said—— has recovered against the said——by a judgment of the Court bearing date," etc., "and have that money before this Court on the——day of——to render to the said——". While it cannot be pretended that the Code expressly provides for, I do not think that it prohibits, and Form 42 seems rather to countenance the inclusion of the prospective costs of execution in the writ. The provisions of the Indian Civil Procedure Code, sec. 235, are substantially identical, as regards the particulars to be included in an application for execution, with those of sec. 224 of our own. But I have not found any decision on the precise point now before us. Under the English Rules of Court the expenses of execution over and above the sum recovered may be levied (R. S. C., Order 42, r. 15) either in one writ, or in a second writ issued not less than eight days after the first (r. 18).

I would dismiss the appeal with costs.

ENSOHAMY *vs.* MARIKAR.

No. 2,455, D. C., Matara.

Present: Hutchinson, C. J., & Wendt, J.

8th April, 1908.

Writ of execution—Res judicata—*Failure to shew cause against issue of writ—Subsequent application to certify payment of judgment-debt.*

The defendant, against whom plaintiff had obtained a judgment, was, on the 21st February, 1903, and 9th March, 1907, absent when noticed to shew cause against issue of writ, and orders were made for the issue of writ. Subsequently he appeared and moved to certify payment of the judgment-debt, producing a receipt dated 20th December, 1900.

Held: That the orders made for the issue of execution in February, 1903, and March, 1907, were *res judicata* between the parties, and the defendant could not be allowed to prove that the judgment-debt was satisfied before the date of the order of March, 1907.

The material facts are as follows:—

Enso-hamy v. Marikar

The original plaintiff obtained judgment against the defendant to recover the sum of Rs. 399·20, and interest and costs.

On 27th July, 1900, writ of execution was issued by the plaintiff, but its execution was stayed and it was returned to Court.

Twice after that application was made to Court to re-issue writ, but writ was not taken out.

On 27th January, 1903, plaintiff moved for a notice on the defendant to shew cause against the issue of writ for a sum of Rs. 459·76. Notice issued, and on 21st February, 1903, it was reported served, but the defendant was absent.

On 5th March, 1903, application was again made to Court for writ, but no writ was issued.

On 27th September, 1906, after notice to defendant the present plaintiff was substituted.

On 21st January, 1907, substituted plaintiff issued notice on the defendant to shew cause why the judgment should not be revived and execution ordered.

On 23rd February, 1907, on service of notice the defendant appeared and was given time to shew cause till 9th March, 1907, on which date the defendant was absent and execution ordered to issue.

On 20th June, 1907, writ was issued.

On 11th September, 1907, the defendant moved to certify a payment of Rs. 399, for which a receipt dated 20th December, 1900, was produced, and the District Judge (G. F. Plant, Esq.) allowed the motion.

A. St. V. Jayawardene for substituted plaintiff-appellant:—Conceding, for the sake of argument, that the receipt was rightly held to be genuine by the District Judge, the respondent was not entitled to avail himself of the receipt at that stage. He says he had the receipt in his possession since December, 1900; yet when he was noticed to shew cause why writ of execution should not re-issue in February, 1903, and again in March, 1907, he did not produce the receipt, nor did he plead that the decree had been satisfied. The plea of payment which he now sets up on the receipt could have been,

and ought to have been made the ground of defence when he was called upon to shew cause. Having failed to do so then the order allowing writ to re-issue operate as *res judicata*. Cited: *Pershad Dichit* v. *Grija Kant* (I. L. R. 8 Cal. p. 51); *Majunath* v. *Venkatesh* (I. L. R. 6 Bom. p. 54); *Sheeraj Singh Kameshar Nath* (24 All. p. 282); *Subbrama Ayar* v. *Nagammal* (24 Mad. p. 669); *Coventry* v. *Tulshi Pershad* (31 Cal. p. 822). As regards the receipt, the evidence supporting it is untrustworthy.

Prins for defendant-respondent:—The District Judge having held the receipt to be genuine this Court will not hold the contrary. The genuineness has been established by very satisfactory evidence. That being the case it was open to this respondent to produce it at any time before realisation of this decree by the sale of their property. The Indian decisions cited are not exactly in point. Further, the respondents could not make any use of the receipt unless satisfaction was certified under sec. 349, Civil Procedure Code. He was now seeking to have the payment made on the receipt so certified, and after that has been done he will plead the certificate of such satisfaction against appellant's application to issue writ.

JUDGMENT.

HUTCHINSON, C. J.—This was an application by the defendant to certify payment of the judgment-debt. Judgment was obtained by consent in March, 1900, for Rs. 399 with interest and costs. On the 6th of July, 1900, writ of execution issued. The defendant alleges that he paid the debt in December, 1900, and he produces a receipt dated the 20th of December, 1900, purporting to be signed by the plaintiff, and to be a discharge in full of principal interest and costs, except Proctor's fees. On the 27th of June, 1901, the writ was returned and the sale stayed at the request of the creditor. In June, 1902, the plaintiff applied for writ to be re-issued; November, 1902, similar application to recover Rs. 459·76. January, 1903, the plaintiff applied for notice on the defendant to shew cause why writ should not issue against him for Rs. 459·76. Notice was duly served on defendant for 21st February. On 21st February, 1903, the de-

Enso-hamy v. Marikar

fendant was absent, and the execution ordered to issue. March, 1903, fresh writ ordered to issue for Rs. 459·76. September, 1906, the plaintiff having died, his widow obtained notice on defendant to shew cause why she should not be substituted plaintiff. November, 1906, plaintiff and defendant being present and no objection made, the motion for substitution of plaintiff was allowed. January, 1907, notice on defendant to shew cause why execution should not issue. 23rd February, defendant said he had cause to shew; case fixed for 9th March. 9th March, defendant absent, order for writ to issue. Then in August the defendant made his application. The District Judge said that the issue is whether the receipt produced by the defendant is genuine or not, and he decided that it is genuine. But there is the further question which was raised, and which the Judge does not refer to, whether the defendant can prove any payment made before the order of March, 1907. In my opinion the orders made for issue of execution for Rs. 459·76 in February, 1903, and March, 1907, are a *res judicata* between the parties, and the defendant cannot be allowed now to prove that the judgment-debt was satisfied before the date of the order of March, 1907.

I would therefore discharge the order of the District Judge with costs in both Courts.

WENDT, J.—I am of the same opinion. I think we must regard the two orders for the issue of execution against the defendant as conclusively settling the rights of the parties at their respective dates.

PONAMMA *vs.* WEERASURIYA *et al.*

NO. 836, D. C., TANGALLE.

Present: WOOD RENTON, J., & GRENIER, A. J.

ARGUMENT: *3rd July*, 1908.

JUDGMENT: *6th July*, 1908.

Fiscal's transfer—Execution after institution of action—Title—Prescription.

A. purchased a land from B., who had bought it at a Fiscal's sale, and in an action against C., a trespasser, called upon B. to warrant title. At the institution of these proceedings B. had not yet obtained his Fiscal's transfer, but it was executed before answer was filed.

Held: That warranty failed, and the transfer came too late to convey title for the purpose of the present proceedings.

Silva v. *Nona Hamine* [(1906) 10 N. L. R. p. 44] followed.

Abubaker v. *Kalu Ettana* [(1889) 9 S. C. R. p. 32]; *Selohamy* v. *Raphiel* [(1892) 1 S. C. R. p. 73] distinguished.

Also: That a Fiscal's sale, though imperfect in the absence of a conveyance, clearly formed a legal starting point for prescription.

vanLangenberg, for 3rd, 4th, 5th, and 6th defendant-appellants, relied on *Silva* v. *Nona Hamine* (10 N. L. R. p. 44), and *Silva* v. *Hendrick Appu* (1 N. L. R. p. 13), and sec. 289 of the Code.

H. A. Jayawardene, for respondent, relied on *Abubaker* v. *Kalu Ettana* (9 S. C. R. p. 32), *Selo Hamy* v. *Raphiel* (1 S. C. R. p. 73). In the first two cases, there was no conveyance at all at any stage. Here it was obtained before answer. Our action was founded on the transfer from 2nd defendant, and not on the Fiscal's conveyance. We undertook to prove our title, and no opportunity was given. The decision in *Silva* v. *Nona Hamine* should be limited to actions under sec. 247.

c. a. v.

JUDGMENT.

WOOD RENTON, J.—The original owner of the land in dispute in this case was Don Bastian Samarasekere. On 15th May, 1880, he mortgaged it. The bond was put in suit and

Ponamma v. Weerasuriya

the land was seized and sold in execution against Don Bastian, in 1889, to the 2nd defendant, who is now dead. The 1st defendant-respondent and the 2nd defendant were Don Bastian's sons. The 4th, 5th, and 6th defendant-appellants are the 2nd defendant's minor heirs, and the 3rd defendant-appellant is their guardian *ad litem*. The Fiscal's sale to the 2nd defendant was confirmed on 11th April, 1901; but the Fiscal's conveyance did not issue till 14th July, 1906—nine days after the institution of the present action by the plaintiff-respondent—to whom the 2nd defendant had sold the land in dispute by deed of 27th January, 1905, and who alleged ouster by the 1st defendant-respondent in February, 1906, called on the 2nd defendant to warrant title or refund the purchase money, and claimed a declaration of title and ejectment as against the 1st defendant-respondent. The 1st defendant-respondent denied that the plaintiff-respondent's vendor had any right to convey; while the 2nd defendant warranted title on the twofold ground of (*a*) purchase at the Fiscal's sale confirmed by the subsequent conveyance and (*b*) prescription. The learned District Judge held that the warrant of title failed as to (*a*), because in the absence of a Fiscal's conveyance, at date of the institution of the present action neither the 2nd defendant nor through him the plaintiff-respondent had acquired the ownership of the land in question; and as to (*b*), because so long as the sale remained incomplete the 2nd defendant could not prescribe against his co-heirs. He therefore dismissed the plaintiff-respondent's action with costs as against the 1st defendant-respondent, but gave him judgment as against the 2nd defendant's heirs—the substituted defendants-appellants—with costs. Against this decree the present appeal is brought. The plaintiff-respondent was not represented on the hearing of the appeal.

I think that the learned District Judge was right on the first point, but wrong on the second.

The cases of *Abubaker* v. *Kalu Ettana* [(1889) 9 S. C. R. p. 32]; and *Selohamy* v. *Raphiel* [(1892) 1 S. C. R. p. 73], in which it was held that a Fiscal's conveyance of land sold in execution had relation back to the date of the execution sale, and therefore enures to the benefit of a party to whom the

Pon-amma v. Weera-suriya

execution purchaser had conveyed before obtaining the Fiscal's conveyance, are clearly distinguishable. In these cases the Fiscal's conveyance was obtained before action brought. Here it was obtained after that date; and *Silva* v. *Nona Hamine* [(1906) 10 N. L. R. p. 44], a decision the scope of which we have no right to limit on this point, as Mr. Jayawardene invited us to do, to actions under sec. 247 of the Civil Procedure Code, and *Silva* v. *Hendrick Appu* [(1896) 1 N. L. R. p. 13], oblige us to hold that it then came too late to confer title for the purpose of the present proceedings. The facts that the 2nd defendant-respondent had obtained the Fiscal's transfer at the date when he filed answer and that the plaintiff-respondent sued, not on the Fiscal's sale, but on his own transfer from the 2nd defendant, are, I think, immaterial. The latter point is exactly covered by *Silva* v. *Hendrick Appu (ubi sup.)*, in which the action was brought by the assignee of the purchaser at the Fiscal's sale. But the Fiscal's sale, though imperfect in the absence of a conveyance, clearly formed a legal starting point for a title by prescription, and I would, therefore, set aside the decree appealed against, and send the case back for trial and adjudication of that issue.

As our judgment involves the entire setting aside of the decree appealed against, I think that the respondents should pay the costs of this appeal, but that the other costs should abide the event.

GRENIER, A. J.—The following issues were agreed to by the parties on the 2nd October, 1906:—

1. Did the Fiscal's conveyance mentioned in the plaint convey title to the 2nd defendant?

2. Had the 2nd defendant at the time of sale the right to convey the land to plaintiff?

3. Had the 2nd defendant prescriptive possession of the land?

The 1st issue is meaningless, because the Fiscal's conveyance to the 2nd defendant is dated the 14th July, 1906, and this action was instituted on the 5th July, 1906. I am inclined to think that the issue really intended was:—"Did the conveyance by 2nd defendant to plaintiff dated the 27th

Ponamma v. Weerasuriya

January, 1905, convey title?" Because that is the only conveyance that is mentioned in the plaint. The 2nd issue would then logically follow this issue:—"Had the 2nd defendant at the time of sale the right to convey the land to plaintiff?" In other words, what was meant was:—The 2nd defendant had no Fiscal's conveyance at the time he sold to plaintiff, but he has one now, and his Fiscal's conveyance related back to the date of sale; the question submitted by this 2nd issue was whether it enured to the benefit of the plaintiff. It must be remembered that the 2nd defendant obtained his Fiscal's conveyance long before he filed answer. The conveyance is dated the 14th July, 1906, and his answer was filed on the 14th September, 1906. The 2nd defendant died after the issues had been framed. So that the Fiscal's conveyance had already enured to the benefit of the plaintiff before the case actually came on for trial. The question to my mind seems to be, whether the mere fact of the plaintiff having instituted his action before his vendor, the 2nd defendant, had obtained a Fiscal's conveyance, operated as a bar to the conveyance enuring to his benefit. No doubt the cases cited at the argument, and which are referred to by my brother, are distinguishable from the present case, in that in the former the Fiscal's conveyance was obtained before action brought. But what is the difference in principle, considering that when the issues were settled, as well as on the date of trial both parties were agreed that the 2nd defendant had duly obtained a Fiscal's conveyance? Why should not that conveyance have, as in ordinary circumstances it would have done, enured to the benefit of the plaintiff, the admitted grantee of the 2nd defendant? Plaintiff's title, which at first was imperfect, was long before the date of trial rendered a good and valid title by his grantee having obtained a conveyance from the Fiscal. And as this was an action *rei vindicatio*, the Court might have examined the parties as to their source of title and then framed issues, in order to determine the question of title once and for all. There was nothing to prevent the plaintiff from producing the Fiscal's conveyance in favour of the 2nd defendant and relying upon it for his title. I find that Mr. Justice Browne took very much the same

view that I am now taking in the case of *Silva* v. *Hendrick Appu* (1 N. L. R. p. 13).

If the plaintiff has no title as derived from 2nd defendant by virtue of the Fiscal's conveyance, then in whom is the title? It cannot be in 2nd defendant's heirs (the 3rd, 4th, 5th, and 6th defendants), because the 2nd defendant has in his answer admitted the title to be in plaintiff; and does not his admission bind his privies in estate?

The case has presented itself to my mind in the way I have stated above, but I cannot resist the weight of the Full Court judgment in the case of *Silva* v. *Hendrick Appu* [(1896) 1 N. L. R. p. 13] although one of the judges dissented from the views of the rest of Court. The ruling in that case has been subsequently followed, and whilst following it myself I have thought it right to express my own opinion on the question. I agree to the order proposed by my brother.

PAKEER BAWA *et al.* *vs.* HASSEN LEBBE *et al.*

NO. 3,324, D. C., KALUTARA.

Present: HUTCHINSON, C. J., & WOOD RENTON, J.

ARGUMENT: 16*th June,* 1908.

JUDGMENT: 23*rd June,* 1908.

Deed of gift—"Dowry deed"—Interpretation.

A deed of gift, styled a "dowry deed", stated, *inter alia*:—

"I, S........, do hereby declare that, as I give my daughter S. N. in marriage according to our religion and customs to...... I. L. M., I hereby appraise and give them the following lands in satisfaction of the gardens and fields which I agreed to give them among other dowry to the value of........

"As we have valued all the abovementioned shares of lands for the sum of........and given them over to them in dower neither we nor our heirs........will have any right of dispute whatever, for the same shall be possessed from this day forth by our daughter, S. N., and by her husband I. L. M., and by their joint heirs, executors and assigns in any way they like."

Pakeer Bawa v. Hassen Lebbe

Held: That the deed gave, and was plainly intended to give, the lands mentioned in it to S. N., and her husband, I. L. M., jointly.

An appeal from a judgment of the District Judge of Kalutara (P. E. Pieris, Esq.).

Bawa for plaintiff-appellant.

vanLangenberg for defendant-respondent.

c. a. v.

JUDGMENT.

WOOD RENTON, J.—This is a partition action; but the only point that we have to consider turns on the construction of a deed, dated 18th May, 1865, whereby Sinne Lebbe Marikar disposed of $\frac{11}{42}$ shares of the land sought to be partitioned. The material parts of the deed are these :—

"I, Sinne Lebbe Marikar Mohamado Lebbe Marikar ....do dereby declare that as I give my daughter Sarifa Natchia in marriage according to our religion and customs to............Ibrahim Lebbe Marikar............I hereby appraise and give them the following lands in satisfaction of the gardens and fields which I agreed to give them among other dowry to the value of £37 10s.

[The boundaries are then set forth; and the deed concludes as follows :—]

"As we have valued all the abovementioned shares of lands for the sum of £37 10s. and given them over to them in dower neither we nor our heirs, etc., will have any right of dispute whatever for the same shall be possessed from this day forth by our daughter Sarifa Natchia and by her husband Ibrahim Lebbe Marikar, and by their joint heirs, executors and assigns in any way they like."

Ibrahim Lebbe died intestate about 30 years ago leaving two children, Asi Yettu Natchia (who is the 2nd plaintiff-appellant, and the wife of the 1st), and Pathumma Natchia. Patumma died about 12 years ago intestate and without issue, and her interests (if any) under the deed of 1865 devolved upon her husband and her sister Asi Yettu. After the death of Ibrahim Lebbe however, his widow, Sarifa Natchia, by

Pakeer Bawa v. Hassen Lebbe

deed of 2nd November, 1879, transferred the entire property covered by the deed of 1865 to the 1st defendant-respondent; and the question before us is whether under the latter deed she had power to do this. The answer to that question depends on whether the deed of 1865 was in favour of Sarifa Natchia alone, or in favour of her and her husband jointly. The learned District Judge has adopted the former view, on the authority of the case of D. C., Batticaloa, No. 15,605 [(1869) Vanderstraaten p. 19]. In my opinion the latter is the correct one. In *Ahamado Lebbe* v. *Adam Bawa* [(1907) 3 A. C. R. 1] my brother Grenier and I distinguished D. C., Batticaloa, No. 15,605, on the ground that in that case the donation of lands was made "on the occasion of the marriage of the female donee", whereas in the one that we had then to deal with the deed was executed after the parties were already married. In the present case it is not clear whether the marriage of Ibrahim Lebbe and Sarifa Natchia was prior, or posterior, to the deed of 1865, but, even if that deed was made in contemplation of the marriage, I conceive that there was nothing to prevent Sinne Lebbe Marikar from making the marriage the occasion of a joint gift to the spouses, if he chose to do so. Whether such was his intention is a question that has to be answered primarily on the construction of the deed itself. It is not satisfactory in the interpretation of such instruments to reason too closely from analagous decisions, particularly when they are reported with such brevity as is the case of D. C., Batticaloa, No. 15,605. The terms of the gifts are not stated; and the proposition that "the mere coupling of the name of the husband with that of the wife as one of the donees cannot be deemed in itself as sufficient to alter the character of the gift" does not involve, as a necessary consequence, the proposition that there may not be such an association of the names of husband and wife in a donation as to show that a joint gift was intended. Each case has to be decided on its own merits. Moreover, if the intention of the donor is clear, there is no justification for allowing it to be modified by the special laws as to intestate succession among Mohammedans (Mohamedan Code). In the present case, I think that the clear intention of Sinne Lebbe Marikar was to benefit Ibrahim Lebbe and

Pakeer Bawa v. Hassen Lebbe

Sarifa Natchia jointly. The conveyance is made to them and their heirs jointly, and the general clause as to possession and enjoyment with which the instrument ends includes them both. The use of the word "dowry" is of course not conclusive as to the character of the gift. I would declare that Sarifa Natchia was entitled to dispose of one-half only of the property dealt with in the deed of 1865, and that the other half belongs to Ibrahim Lebbe's heirs. That point of the judgment of the District Court in which it is held that the $\frac{1}{4}\frac{1}{2}$ share claimed by the 1st defendant-respondent could be validly disposed of by Sarifa must be set aside, and the decree for partition amended in pursuance of the above declaration.

The appellants should have the the costs of this appeal.

HUTCHINSON, C. J.—It has not been, and it could not be, contended that it is illegal for the parents of a Moslem bride to make gift of lands to her and the bridegroom jointly upon the occasion of the marriage. But the District Judge, without giving any reasons, has held that by the deed of 18th May, 1865, those lands were given to the bride alone. My brother Wood Renton has set out in his judgment the material parts of the deed according to the translation which was put in evidence. It is styled a "dowry deed"; but dowry is not always, amongst Moslems any more than amongst Christians, given either to the wife alone or to the husband alone, or to them jointly; there is no law to prevent the donors from making provision in a dowry deed for the husband and children as well as for the wife. The deed of 18th May, 1865, gave, and was plainly intended to give, the lands mentioned in it to Sarifa Natchia and her husband Ibrahim Lebbe Marikar jointly. The decree of the District Judge should be amended accordingly, and the respondents should pay the appellant's costs of this appeal.

KARUNAWARDENE *vs.* WIJESOORIYA *et al.*

Karunawardene v. Wijesooriya

No. 4,564, C. R., Galle.

Present: Hutchinson, C. J.

Argument: *30th June, 1908.*

Judgment: *14th July, 1908.*

Res judicata—*Dismissal of action by administratrix because letters not duly stamped—Subsequent action on the same cause of action.*

The plaintiff sued as administratrix, and her action was dismissed as her letters were not then duly stamped. After the defect had been remedied she brought a subsequent action on the same cause of action.

Held: That she could maintain the subsequent action, and the former action was not *res judicata.*

A. St. V. Jayawardene for defendant-appellant:—The judgment in the first case was *res judicata*, and prevented plaintiff from maintaining the present action. When the first action was brought the plaintiff had title, and what was wanting was only the right to sue as administratrix, and the plaintiff could have obtained permission to clothe herself with this right while the cause was pending; but the plaintiff never made such an application. It was held in *Henderson* v. *Henderson* [(1843) 3 Hare 115] that "the plea of *res judicata* applies............to every point which properly belonged to the subject of the litigation, and which the parties exercising reasonable diligence might have brought forward at the time". In this case the plaintiff, in neglecting to get herself clothed with the character of administratrix respecting the subject matter of this action, failed to exercise reasonable diligence. This clearly falls within the definition of *res judicata* as given in the explanation to sec. 207 of the Civil Procedure Code. This section has altered the law of *res judicata* as it existed before the Code [*Baban Appu* v. *Goonewardene* (10 N. L. R. 167)]. Further, if the first action could not be maintained owing to the formal defect, application should have been made to withdraw from the action with liberty to institute a fresh action under sec. 406 of the Code. But no such application was made, and plaintiff's

Karunawardene v. Wijesooriya

action was dismissed without any reservation. The first action, as shewn by the plaint, was instituted by plaintiff as administratrix, and that action having been dismissed, her claim is *res judicata*.

E. W. Jayawardene for plaintiff-respondent:—Sec. 207 of the Civil Procedure Code applies only to a case where the plaintiff was in law entitled to claim, set up, or put in issue the same matter in the previous suit. The words of the section (in its explanation) are: "every right of property ....which *can* be claimed, set up, or put in issue." The Supreme Court held that the plaintiff was not entitled to sue on the ground that she was not fully clothed with the character of administratrix. The plaintiff was not the administratrix then. The identity of parties is necessary for the plea of *res judicata*. The principles of the law as to *res judicata* are the same in English Law, Indian Law, and under the Code. The matter must have been directly and substantially in issue in the previous suit. The only matter in issue was, whether the plaintiff was administratrix. The first essential of the rule of *res judicata* is the identity of the matter in issue. The decision on a preliminary point is *res judicata* only as regards that point in a subsequent suit. In *Dullabh Jogi* v. *Narayan* (4 B. H. C. R. p. 110) Sir Richard Couch, C. J., said: "The former suit was not heard and determined, for it failed by reason only of an informality, and it would be contrary to all principles of justice that the parties should be held to be conclusively barred thereby." In *Shokhee Bewa* v. *Mehdee Mundul* (9 W. R. p. 327); and *Pursun Gopal* v. *Poovnanund* (21 W. R. p. 272), the former suit not having been tried on the merits, the subsequent suit was held not to be barred. Hukm Chand in his work on *Res Judicata* (p. 114) mentions English, American, and Indian cases where the dismissal of a suit on the ground of any technical defect is not *res judicata* in regard to a subsequent suit in a *proper* form.

The heirs will be the losers, and they were not represented in the first action. They are represented now.

A. St. V. Jayawardene in reply:—The decisions cited from the Indian Courts have no application, as the definition

Karunawardene v. Wijesooriya

of *res judicata* in sec. 13 of the Indian Code is entirely different from that given in the explanation to sec. 207 of the Ceylon Code. It is submitted that the law would be different here owing to the very comprehensive nature of the explanation to sec. 207. The present case is similar to that of a person suing on an unstamped or insufficiently stamped document. The holder of a note whose action is dismissed because the instrument on which he sues is improperly stamped cannot sue again on the same note after getting his note properly stamped under the Stamp Ordinance.

c. a. v.

JUDGMENT.

HUTCHINSON, C. J.—The plaintiff sues in this action as administratrix of the estate of the late Andris de Silva, Constable Arachchi, on a mortgage bond granted to him by Don Simon de Silva, now deceased. The defendants are sued as heirs of the mortgagor. She had sued the same defendants on the same cause of action in a former case in the same Court. That action was dismissed, the reason for the dismissal being that the plaintiff's letters of administration were not duly stamped. In the present action the defendants set up the plea of *res judicata*, pleading the decree dismissing the former action in bar of this action. The Commissioner overruled this defence. He held that the parties are not the same, because the plaintiff in the former action was not the administratrix, inasmuch as her letters were not then duly stamped; and he gave judgment for the plaintiff in accordance with her prayer.

The defendants appeal from that judgment. There was an issue agreed upon, "whether the defendants adiated the estate of the deceased mortgagor?" But no evidence was taken, and the Commissioner made no reference to it, and nothing has been said about it in the petition of appeal or on the argument. The only question is, whether the claim is *res judicata*.

The appellants contend that the plaintiff in the former action sued as administratrix, and that she was the administratrix; that her action failed because the grant to her was not duly stamped, but that she could have cured that defect

Karunawardene v. Wijesooriya

by getting it duly stamped at any time before judgment, or she could have applied to the Court under sec. 406 of the Code for leave to withdraw that action and bring a fresh action; that this was like a case of a plaintiff suing on a deed or pro. note whose action is dismissed because at the date of trial and judgment the deed or note was not, and could not be, put in evidence because it was not duly stamped.

The law as to *res judicata* in Ceylon is contained in sec. 207 of the Civil Procedure Code. The "explanation" to that section says that every right to relief of any kind which can be claimed or set up or put in issue between the parties to an action upon the cause of action for which the action is brought, whether it is actually so claimed, set up, or put in issue or not, becomes on the passing of the final decree a *res judicata*, which cannot afterwards be made the subject of action for the same cause between the same parties. Several Indian cases were quoted by the respondent's Counsel. The Indian Law on the subject is contained in sec. 13 of the Indian Civil Procedure Code. This enacts that "no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties litigating under the same title in a court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court." I do not think that there is any substantial difference between the two enactments.

I do not think that this is like the case of a claim on a bond which is in existence but which, because it is not stamped or for some other reason, the plaintiff fails to put in evidence. There the plaintff's right to sue is complete, but his action is dismissed for want of evidence which he might have adduced.

This is like the case of a claim for a debt which is not due at the time the action is tried; the dismissal of the action would not be *res judicata* when a second action was brought after the debt became due. Here the plaintiff was not entitled to maintain her first action at the time of the trial of that action: she sued in a respresentative

character, and she had no title to sue then. Now she has a title.

In my opinion the appeal should be dismissed with costs.

KIRI BANDA *vs.* THE GOVERNMENT AGENT, SABARAGAMUWA PROVINCE.

No. 1,412, D. C., Ratnapura.

Present: Wendt & Wood Renton, JJ.

Argument: *19th August, 1908.*

Judgment: *25th August, 1908.*

Waste lands—Chena *land—Presumption in favour of Crown—Ordinance No.* 12 *of* 1840, *sec.* 6 *; and Ordinance No.* 1 *of* 1897, *sec.* 24—*Implied repeal.*

The nature of the proof required in rebuttal of the presumption created in favour of the Crown by sec. 6 of Ordinance No. 12 of 1840 is not impliedly repealed by sec. 24 of Ordinance No. 1 of 1897, and the latter enactment is not inconsistent with the provisions of the earlier Ordinance.

V. M. Fernando for appellant:—Sec. 6 of Ordinance No. 12 of 1840 does not apply. It is impliedly repealed by sec. 24 of Ordinance No. 1 of 1897. The two are inconsistent, for the latter treats of all *chenas* alike, and Ordinance No. 12 of 1840 makes a distinction between *chenas* in the Kandyan provinces and *chenas* in the low country. Even if Ordinance No. 12 of 1840 applies, the section should be liberally construed in view of the abolition of the grain tax. A method of proof has thus been taken away. The twenty years should be counted as twenty years from the last date on which payment could have been made.

The Solicitor-General for respondent:—Ordinance No. 1 of 1897 is not inconsistent with Ordinance No. 12 of 1840. The latter is the general Ordinance which comes in when under sec. 24 of Ordinance No. 1 of 1897 proof has to be given. The abolition of the grain tax and the consequent loss of a method of proof may be ground why the Government

Kiri Banda v. The Govt. Agent, Sabaragamuwa Province

Agent should give appellant an indulgence, but cannot be urged here.

c. a. v.

JUDGMENT.

WENDT, J.—This is an action by an unsuccessful claimant under the Waste Lands Ordinances. The land in question is admittedly *chena* land which (also admittedly) must be presumed to be the property of the Crown, and not of the plaintiff. The question is, whether this presumption has been rebutted; and this question resolves itself into a question of law as to the nature of the proof admissible for the rebuttal. For the defendant it is contended that sec. 6 of the Ordinance No. 12 of 1840 is applicable, and that the *chenas* being within the Kandyan provinces the claimant is limited to proof of a *sannas* or grant or proof of payment to the Crown within twenty years of taxes usually levied in respect of private lands. The plaintiff, on the other hand, argues that sec. 6 has been impliedly repealed by sec. 24 of Ordinance No. 1 of 1897—the Ordinance under which the present proceedings were taken—and under sub-sec. (a) of sec. 24 the presumption upon which the Crown relies could be rebutted by any mode of proof which the plaintiff could command. It is practically admitted that if sec. 6 of the Ordinance of 1840 is unrepealed the plaintiff must fail. Now, the case for implied repeal could only be made out if the two enactments were so inconsistent that they could not possibly stand side by side; and that, in my opinion, cannot be said of the two provisions we are considering. Sec. 24 (a) enacts that all *chenas*, without distinction as to their situation, shall be presumed to be the property of the Crown until the contrary thereof be proved. That is not inconsistent with the earlier enactment, which ordains that in the case of *chenas* in the Kandyan provinces the contrary shall only be proved by evidence of a particular description. There is, therefore, no implied repeal. It follows that plaintiff's title fails, and his appeal must be dismissed with costs.

WOOD RENTON, J.—I concur.

KIRI BAIYA *vs.* SLEMA LEBBE *et al.*

NO. 10,205, C. R., GAMPOLA.

Present: WOOD RENTON, J.

ARGUMENT: *27th August, 1908.*

JUDGMENT: *7th September, 1908.*

Res judicata—*Action for declaration of title—Subsequent action for mesne profits—Civil Procedure Code, secs.* 35 (1) (*a*), 196 *&* 207.

On 28th February, 1907, the plaintiff obtained a declaration of title against the defendant to certain undivided land, and in a subsequent action claimed from the defendant damages from March, 1907, onwards.

Held: That the plaintiff could not maintain his action, as it was competent for him to have embodied that claim in his original action so as to have made the decree in that action conclusive sgainst his right to sue for such mesne profits subsequently.

Also: That the words "or arrears of rent" in sec. 35 (1) (a) of the Civil Procedure Code do not restrict the provisions contained in sec. 198 to mesne profits prior to the institution of the suit.

The plaintiff in this action sued the defendants for quiet possession of a divided share of land and also for damages. In a previous case, decided on the 28th February, 1907, the plaintiff had obtained judgment for a declaration of title to an undivided share, and in the present case he claimed damages from March, 1907. The Commissioner (W. de Livera, Esq.) allowed the plaintiff damages, and the defendants appealed.

A. St. V. Jayawardene for defendants-appellant:—The plaintiff's claim was barred by reason of the decree in C. R., Gampola, No. 9,395. The latter case was instituted by the respondent against the plaintiff for a declaration of title to the land for the forcible possession of which respondent claims damages or mesne profits in this case. The present claim could have been, and ought to have been, included in that case: *Vide* sec. 24, Civil Procedure Code, which enacts that "every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action". The present claim arises from the same cause of action out of which the first action arose, Sec. 196 enables the Court,

Kiri Baiya v. Slema Lebbe

when the action is for the recovery of immovable property, to award to the plaintiff mesne profits or damages until restoration to possession. So that clearly the respondent could have claimed, and the Court could have granted in the first action, the damages which the respondent now claims. Then applying the principle laid in the explanation to sec. 207, by which every right to property or to money or to damages which can be claimed or set up between the parties to an action upon the cause of action for which the action is brought, whether it be actually claimed or set up or not, becomes on the passing of the decree *res adjudicata*, and cannot afterwards form the subject of another action, the plaintiff's action is barred. This view has been upheld in *Kirihamy* v. *Dingiri Amma* [(1906) 1 Bal. 146].

No appearance for respondent.

C. a. v.

JUDGMENT.

WOOD RENTON, J.—This is an appeal against a decree of the Commissioner of Requests, Gampola, in which the respondent sued the appellants for quiet possession of a divided share of certain land and also for Rs. 46 by way of damages, Rs. 4 a month further damages *pendente lite* and costs. The damages claimed are in the nature of mesne profis. The appellants in their defence made answer that the action was barred, inasmuch as the matter in dispute between the parties had been raised in a previous case, C. R., Gampola, No. 9,395, and had already been decided.

At the trial no evidence was led, and the case has proceeded so far only on the point of law raised in the appellants' answer.

Since the argument of this appeal I have called for the record in C. R., Gampola, No. 9,395, and it appears therefrom that the action was instituted on the 2nd August, 1906, and came on for trial on the 28th February, 1907.

In the present case the respondent claims mesne profits from March, 1907, onwards, and the question of law that has to be decided is whether it was competent for him to embody that claim in his original action so as to make the decree in that action conclusive against his right to sue for such mesne profits now.

Kiri Baiya v. *Slema Lebbe*

The learned Commissioner of Requests has decided this point in favour of the respondent. He says that it is settled law that mesne profits before the institution of a first suit cannot be sued for in a subsequent suit, but that the present case is for damages in respect of mesne profits after the institution of the first suit and after trial of that suit. He holds, therefore, that an action is maintainable.

I agree with Mr. Jayawardene that this decision is wrong. It is clear that under sec. 207 of the Civil Procedure Code a decree passed by the Court is final between the parties in regard to every form of relief which was capable of being claimed in the action; and, as sec. 196 of the Civil Procedure Code provides that, when an action is brought for the recovery of the possession of immoveable property yielding rent or other profit, the Court may, when such a prayer is embodied in the plaint, award the plaintiff in the decree mesne profits from the date of the institution of the action until the delivery of possession to the party in whose favour the decree is made, I think that it was competent for the respondent to have claimed such mesne profits in his original suit. So far as it goes the decision of Sir Charles Peter Layard in the case of *Kirihamy* v. *Dingiri Amma* (1 Bal. p. 146) supports the view of the law that I have taken in the present case. In view of the provisions of sec. 196 of the Civil Procedure Code, I do not think that the clause in sec. 35 (1) (a), which enables a plaintiff to join with an action for immovable property "claims in respect of mesne profits", should be held by reason of the fact that it is immediately followed by the words "or arrears of rent" to be restricted to mesne profits prior to the institution of the suit. The decree appealed against must be set aside, and the respondent's action dismissed with costs here and below.

Perera v. Silva

PERERA *vs.* SILVA.

NO. 15,775, C. R., NEGOMBO.

Present: WOOD RENTON, J.

ARGUMENT: *28th August, 1908.*

JUDGMENT: *31st August, 1908.*

Contract—Agreement to sell—Failure—Action for recovery of earnest money—Oral evidence—Admissibility to prove contract required to be in writing—Evidence Ordinance (No. 14 *of* 1895*), sec.* 91.

Where a person agreed orally to sell land and failed to do so and was sued for the return of the earnest money,

Held: That the action was competent although the agreement was not reduced to writing.

When sec. 91 of the Evidence Ordinance provides that no evidence shall be given "in proof" of a contract which ought to be in writing it contemplates a case where an action is brought for the enforcement of, or directly upon, the contract itself.

A. St. V. Jayawardene for defendant-appellant.

Samarawickreme for plaintiff-respondent.

c. a. v.

JUDGMENT.

WOOD RENTON, J.—In this case the respondent sued the appellant for the recovery of a sum of Rs. 200, alleged to have been advanced by him as earnest money for the subsequent conveyance of a certain land by the appellant to him. There is no written record of the terms on which this advance was made, and the question therefore arises whether under sec. 2 of Ordinance No. 7 of 1840 it is competent for the respondent to recover this money on the appellant's failure to carry out the undertaking in respect of which the earnest was alleged to have been paid.

It would not be open for me, sitting here as a single judge, to decline to answer this question in the affirmative if it had arisen prior to the Evidence Ordinance No. 14 of 1895—see the cases of C. R., Panwila, No. 3,713 [Grenier (1873-1874) Part ii. p. 34], and *Grigoris* v. *Tillekeratne* [(1893) 2 C. L. R. p. 191]. But Mr. Jayawardene contended that, in view of sec. 91 of the Evidence Ordinance, which forbids oral evidence to be adduced "in proof" of a contract, which is required by law to be reduced to writing, the respondent's action

ought to have been dismissed. I think that when sec. 91 provides that no evidence shall be given "in proof" of a contract which ought to be in writing, it contemplates a case where an action is brought for the enforcement of, or directly upon, the contract itself. I think that this is good law, and I am sure that it is good sense. The appeal is dismissed with costs.

Baba Singho v. Don Salmon

BABA SINGHO *et al.* *vs.* DON SALMON *et al.*

NO. 4,597, C. R. (Addtl.), GALLE.

Present: WENDT J.

ARGUMENT: *28th July, 1908.*

JUDGMENT: *4th August, 1908.*

Fiscal's Transfer—Execution sale—Claim before transfer was obtained—Title—Action under sec. 247, Civil Procedure Code.

Where a person had bought property sold in execution under a mortgage decree and the property was seized under another writ before the purchaser had obtained his Fiscal's transfer,

Held: That the purchaser had no title, and could not succeed in claim proceedings or in an action under sec. 247 of the Civil Procedure Code.

Further: The remedy for the purchaser was to have obtained an order asking that the sale be carried out subject to the mortgage, so that the purchaser at the later execution sale would have been bound by the mortgage action and by the subsequent transfer of title by the Fiscal's conveyance under the original sale.

A. St. V. Jayawardene for appellant.

No appearance for respondent.

c. a. v.

JUDGMENT.

WENDT, J.—This is an action brought by unsuccessful claimants under sec. 247 of the Civil Procedure Code. The facts are as follows:—On 14th May, 1906, the plaintiffs, as holders of a mortgage decree, purchased in execution the interest of the 2nd defendant (now deceased) in certain land, and on 31st January, 1907, obtained the usual Fiscal's transfer. Between these two dates the 1st defendant seized the same

Baba Singho v. Don Salmon

interest in execution of a money decree against the 2nd defendant. Plaintiffs thereupon claimed the land as their own by virtue of their purchase and objected to the sale. The claim was disallowed on the ground that the claimants at the date of seizure had no Fiscal's conveyance and the title therefore remained in the execution-debtor. Plaintiffs then brought the present action, which is obviously framed under sec. 247, and pray for a declaration of title and a declaration that the property is not liable to sale under 1st defendant's writ of execution. Before answer was filed the sale had been carried out, and 1st defendant had himself become the purchaser.

In view of the decision of the Full Court in *Silva* v. *Nona Hamine* [(1906) 10 N. L. R. p. 44] the right of plaintiffs to maintain the action was but faintly asserted in the court below; but Mr. Jayawardene pressed the point before me, and I have to decide it. He relied upon the following *dictum* of the Chief Justice in the case just mentioned (at p. 46): "Perhaps if the purchaser had done all that he had to do in order to complete his title, and the delay in obtaining the transfer was merely the fault of the Fiscal, the Court might hold that that must be taken to have been done which ought to have been done, and that the conveyance should date from the sale, or at least from the date when the purchaser had done all he could to obtain it."

There is, however, no evidence to bring the case within the terms of that *dictum*, or to take it out of the operation of the decision of the Full Court, and plaintiffs must therefore fail. They claimed the property for their own, and objected to any sale at all, when in fact they were not the owners of the property. I see no hardship in the decision against them. They were mortgagees, and no doubt it looks at the first blush as if they had in no way bettered their position by obtaining a mortgage decree and being declared the purchasers at the execution sale thereunder. But that is not so in reality, and plaintiffs have themselves to thank for having claimed too much. They asserted title when they had no title. Perhaps if they had contented themselves with founding on their mortgage, which was binding on 1st defendant, and asking that the sale be carried out subject to that mortgage and the mortgage decree (sec. 246 of the Code), they would have

succeeded, with the consequence that the 1st defendant, as purchaser at the sale, would have been bound by what had been done in the mortgage action and by the transfer of title to plaintiffs, when that transfer was made in due course.

Both in the Court below and in appeal plaintiff asked that the action be treated as an ordinary *rei vindicatio*; but I am of opinion they are certainly not entitled to that indulgence, and I entirely agree with what the learned Commissioner has said on this point.

I dismiss the appeal with costs.

SALLAY *vs.* PERERA.

No. 9,054 (B), P. C., Colombo.

Present: Wood Renton, J.

Argument: *27th August, 1908.*

Judgment: *31st August, 1908.*

Security to keep the peace—Non-forfeiture of bond on conviction—Subsequent forfeiture.

Where a magistrate has before him the fact that a person convicted by him of an offence attended with violence was under recognizance to keep the peace, and does not nevertheless proceed to forfeit such recognizance, he must be taken to have considered that the penalty which he had imposed was a sufficient punishment for the offence, and it is incompetent for him to inflict a further penalty on a reconsideration of the circumstances.

Koch (with *de Zoysa*), for accused-appellant, relied on the wording of sec. 411 of the Criminal Procedure Code, and the cases *In re Ram Chunder Lalla* [(1877), 1 Cal. L. R. p. 134]; and *In re Parbutti Churu Bose* [(1878) 3 Cal. L. R. p. 406].

c. a. v.

Judgment.

Wood Renton, J.—The appellant was convicted on the 11th February, 1908, [see P. C., Colombo, record No. 9,354 (A)] of the offence of hurt under sec. 314 of the Ceylon Penal Code, and he was sentenced to pay a fine of Rs. 50, and was also ordered to give security in Rs. 250, personally, with a

Sallay v. Perera

surety in the like sum, to keep the peace for six months. From what I have said it will appear that the surety bond was due to expire on the 11th August, 1908. On the 27th May the appellant was again charged before the same Police Magistrate who tried the case of 11th February with affray, and he was fined Rs. 2·50 (see P. C., Colombo, record No. 10,948). On the 3rd August another charge before the same Police Magistrate (which is in the meantime standing over) was brought against him of having behaved in a disorderly manner on the public road. The Police Magistrate called on him under sec. 411 of the Criminal Procedure Code to shew cause why, in respect of the conviction of the 26th May last, the bond of 11th February, 1908, should not be forfeited; and in the event he did forfeit it, ordered a distress warrant to issue. I am clearly of opinion that this order was bad. The case is governed by two decisions under the corresponding section—sec. 514 sub-sec. 1—of the Indian Criminal Procedure Code, viz., *In re Ram Chunder Lalla* [(1877) 1 Cal. L. R. p. 134]; and *In re Parbutti Churu Bose* [(1878) 3 Cal. L. R. p. 406]. In these cases it was held that when a magistrate has before him the fact that a person, convicted by him of an offence attended with violence, was under recognizance to keep the peace and does not nevertheless proceed to forfeit such recognizance, it is incompetent for him to inflict a further penalty on a reconsideration of the circumstances.

In the present case the learned Police Magistrate was quite aware, when he sentenced the appellant to a fine for affray on the 26th May, 1908, of the existence of the security bond; and as he did not then call upon the accused under sec. 411 sub-sec. 1 of the Criminal Procedure Code to shew cause against its forfeiture, I think that he must be taken to have considered that the penalty which he had imposed as a sufficient punishment for the offence.

I entirely agree with the comment of Mr. Justice Maclean in the latter of the two Indian cases which I have cited that it cannot be the intention of the Legislature that when a forfeiture of a bond has been proved before a magistrate the recovery of the penalty may be kept suspended on the head of a person liable for an indefinite period.

I set aside the order under appeal.

PERERA *vs.* SILVA *et al.*

(In Revision.)

No. 7,079, D. C., Negombo.

Present: Hutchinson, C. J., & Wendt, J.

13th July, 1908.

Revision, power of—When such power should be exercised—Civil Procedure Code, sec. 753.

Per Hutchinson, C. J.—It is difficult to say in what cases the Court ought, and in what cases the Court ought not, to exercise the power of revision under sec. 753. The Court often does exercise that power where the applicant has no other remedy.

The power ought not to be exercised, and the Legislature could not have intended that it should be exercised, so as to give the right of appeal, practically, in every case.

Per Wendt, J.—Unlike an appeal, which is a matter of right, relief by way of revision is placed by sec. 753 in the discretion of the Court, and the Court has been unwilling to exercise the power of revision where another remedy as of right is open to the applicant.

E. W. Jayawardene for petitioner.

H. A. Jayawardene (with him *A. St. V. Jayawardene*) *contra.*

Judgment.

Hutchinson, C. J.—This is an application by the execution-creditor for revision of an order made by the District Court allowing a claim under sec. 244 of the Civil Procedure Code. The applicant had another remedy apparently under sec. 247, *i.e.*, by bringing an action. The order of the District Court does not seem to me on the face of it wrong, and I do not think that the point he had to decide was perfectly easy or simple. I do not feel in the least able to say in what cases the Court ought, and in what cases the Court ought not, to exercise the power of revision under sec. 753. I know that it often does exercise that power where the applicant has no other remedy. But I do not think that the power ought to be exercised, or that the Legislature could have intended that it should be exercised, so as to give the right of appeal, practically, in every case, large or small, simple or difficult.

Perera v. Silva

This is a case in which the applicant had another remedy provided by the Legislature; and it is not a case in which the order is obviously wrong. Therefore, I do not think it right to call on the respondent to argue it.

I refuse to exercise the power of revision, and dismiss the application with costs.

WENDT, J.—I agree. Unlike an appeal, which is a matter of right, relief by way of revision is placed by sec. 753 in the discretion of the Court, and I think I may say, as a result of the decided cases, that the Court has been unwilling to exercise the power of revision where another remedy as of right is open to the applicant.

In the present case I do not think it can be said, as applicant's counsel wished to say, that the order complained of is *ex facie* bad; and, without limiting our right to interfere to cases of that description, I agree that we ought not to interfere in the present instance.

[NOTE BY EDS.—The following case, referred in *Attorney-General v. Smith* (II. N. L. R. p. 126), is reprinted from 65 Lawyers' Reports Annotated, p. 372 *et seq.*:—]

UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

Lottie F. POWERS, *Plff. in Err.*,

v.

MASSACHUSETTS HOMŒOPATHIC HOSPITAL.

(47 C. C. A. 122, 109 Fed. 294.)

A hospital organized exclusively for charity is not liable for injury to a patient caused by the negligence of its carefully selected nurse, even though a charge is made and paid for the services rendered to the patient injured,—at least if the amount paid does not make full pecuniary compensation for the services rendered: since an agreement to hold the hospital harmless for the acts of its servants arises, by necessary implication, from the relation of the parties.

(May 27, 1901.)

Error to the Circuit Court of the United States for the District of Massachusetts to review a judgment in favor of defendant in an action brought to recover damages for negligent injuries inflicted upon plaintiff for which defendant was alleged to have been responsible. *Affirmed.*

The facts are stated in the opinion.

Argued before *Colt*, Circuit Judge, and *Brown* and *Lowell*, District Judges.

Messrs. **Thomas H. Russell** and **Arthur H. Russell** for plaintiff in error:

Calling a corporation a charitable institution does not necessarily make it so. What is a charity, and what is not,

---

NOTE.—As to liability of charitable institutions or hospitals for negligence, see also, in this series, *note* to Williamson v. Louisville Industrial School of Reform, 23 L. R. A. 200; also Union P. R. Co. v. Artist, 23 L. R. A. 581; Downs v. Harper Hospital, 25 L. R. A. 602; Eighmy v. Union P. R. Co. 27 L. R. A. 206; and Hearns v. Waterbury Hospital, 31 L. R. A. 224.

Powers v. Massachusetts Homœopathic Hospital

depend on the acts and doings of the corporation seeking to protect itself when sued for alleged negligent acts by covering itself with a mantle and marking it charity.

Donnelly v. *Boston Catholic Cemetery Asso.* 146 Mass. 163, 15 N. E. 505.

The facts that the funds received were actually applied, to a considerable extent, to charity is no more material than evidence of a similar application of a part of his income by a private citizen would be in a suit against him.

Chapin v. *Holyoke Y. M. C. A.*, 165 Mass. 280, 42 N. E. 1130; *Newcomb* v. *Boston Protective Department*, 151 Mass. 215, 6 L. R. A. 778, 24 N. E. 39; *Coe* v. *Washington Mills*, 149 Mass. 543, 21 N. E. 966.

In the case at bar the admission of any free patients was a matter of courtesy, and not of right, except as to twenty free beds, which were required to be maintained under sec. 2 of the act of 1890. This particular purpose could not change the general scheme of the corporation. *Atty.-Gen.* v. *Federal Street Meeting House*, 3 Gray 1.

Should the court consider that the defendant corporation is a public charitable institution, nevertheless it is responsible if it lays aside the protection of its charitable nature, and enters into contracts to render service.

Ward v. *St. Vincent's Hospital*, 39 App. Div. 624, 57 N. Y. Supp. 784; *Glavin* v. *Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675.

It is a question for the jury whether reasonable care has been used in selecting and obtaining skilful and careful attendants.

Union P. R. Co. v. *Artist*, 23 L. R. A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365; *VanTassell* v. *Manhattan Eye & Ear Hospital*, 39 N. Y. S. R. 781, 15 N. Y. Supp. 620; *Secord* v. *St. Paul, M. & M. R. Co.* 5 McCrary, 515, 18 Fed. 221.

The case last cited holds that a corporate body authorised to perform a work and receive tolls, although obtaining no profit for itself from such works, but collecting for the maintenance of the work and the future benefit of the public, is responsible for injuries from improper performance of the

Powers v. Massachusetts Homœopathic Hospital

work; and the funds held by the body must be used to discharge and satisfy any judgment obtained.

Mersey Docks & Harbour Board v. *Gibbs*, 11 H. L. Cas. 686, 35 L. J. Exch. N. S. 225, L. R. 1 H. L. 93, 12 Jur. N. S. 571, 14 L. T. N. S. 677, 14 Week. Rep. 872; *Coe* v. *Wise*, L. R. 1 Q. B. 711, 7 Best & S. 831, 35, L. J. Q. B. N. S. 262, 14 L. T. N. S. 891, 14 Week. Rep. 865; *Levingston* v. *Lurgan Union*, Ir. Rep. 2 C. L. 202, 18 L. T. N. S. 338; *Foreman* v. *Canterbury*, L. R. 6 Q. B. 214, 40 L. J. Q. B. N. S. 138, 24 L. T. N. S. 385, 19 Week. Rep. 719; *Donaldson* v. *General Public Hospital*, 30 N. B. 279.

The fact that the corporation had no capital stock, no provisions for making dividends or profits, and was carried on without any expectation of ultimate profit on the part of those interested, or of receiving compensation for their own benefit, is of no avail.

Donelly v. *Boston Catholic Cemetery Asso.*, 146 Mass. 163, 15 N. E. 505; *Chapin* v. *Holyoke Y. M. C. A.*, 165 Mass. 280, 42 N. E. 1130; *Newcomb* v. *Boston Protective Department*, 151 Mass. 215, 6 L. R. A. 178, 24 N. E. 39.

Messrs. **Charles P. Greenough** and **Julian Codman** for defendant in error.

The defendant is a charitable corporation.

Acts 1855 chap. 411; acts 1890, chap. 358; *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Jackson* v. *Phillips*, 14 Allan, 556; *Fire Ins. Patrol* v. *Boyd*, 120 Pa. 624, 1 L. R. A. 417, 6 Am. St. Rep. 745, 15 A. L. T. 553; *Hearns* v. *Waterbury Hospital*, 66 Conn. 99, 31 L. R. A. 224, 33 Atl. 595; *Union P. R. Co.* v. *Artist*, 23 L. R. A. 581, 9. C. C. A. 14, 19. U. S. App. 612, 60 Fed. 365; *Heriot's Hospital* v. *Ross*, 12 Clark & F. 507.

The fact that the plaintiff agreed to pay for her room at the hospital does not affect the status of the defendant corporation as a charitable corporation.

McDonald v. *Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Gooch* v. *Association for Relief of Aged Indigent Females*, 109 Mass. 558; *Union P. R. Co.* v. *Artist*, 23 L. R. A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365.

Powers v. Massachusetts Homœopathic Hospital

In England no action for the negligence of its agents or servants can be maintained against a charitable institution of this character.

Heriot's Hospital v. *Ross*, 12 Clark & F. 507; *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Benton* v. *City Hospital*, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836; *Hill* v. *Boston*, 122 Mass. 368, 23 Am. Rep. 332. At most, such corporation can be held responsible for the negligence of the directors or trustees in failing to select proper servants, or to make suitable regulations for the management of their trust. The defendants are not responsible for the negligence of their nurses or servants provided due care has been used in their selection.

Union P. R. Co. v. *Artist*, 23 L. R. A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365; *Pierce* v. *Union P. R. Co.*, 13 C. C. A. 323, 32 U. S. App. 48, 66 Fed. 44; *Secord* v. *St. Paul, M. & M. R. Co.*, 5 McCrary 515, 18 Fed. 221; *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Benton* v. *City Hospital*, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836; *O'Brien* v. *Cunard S. S. Co.*, 154 Mass. 272, 13 L. R. A. 329, 28 N. E. 266; *Chapin* v. *Holyoke Y. M. C. A.*, 165 Mass. 280, 42 N. E. 1130; *Joel* v. *Woman's Hospital*, 89 Hun. 73, 35 N. Y. Supp. 37; *Harris* v. *Woman's Hospital*, 27 Abb. N. C. 37, 14 N. Y. Supp. 881; *VanTassell* v. *Manhattan Eye & Ear Hospital*, 39 N. Y. S. R. 781, 15 N. Y. Supp. 620; *Laubheim* v. *De Koninglyke Nederlandsche S. B. Maatschappy*, 107 N. Y. 228, 1 Am. St. Rep. 815, 13 N. E. 781; *Allan* v. *State S. S. Co.*, 132 N. Y. 91, 15 L. R. A. 166, 28 Am. St. Rep. 556, 30 N. E. 482; *Hass* v. *Missionary Soc.*, 6 Misc. 281, 26 N. Y. Supp. 868; *Hearns* v. *Waterbury Hospital*, 66 Conn. 99, 31 L. R. A. 224, 33 Atl. 595; *Fire Ins. Patrol* v. *Boyd*, 120 Pa. 624, 1 L. R. A. 417, 6 Am. St. Rep. 745, 15 Atl. 553; *Perry* v. *House of Refuge*, 63 Md. 20, 52 Am. Rep. 495; *Pittsburgh C. C. & St. L. R. Co.* v. *Sullivan*, 141 Ind. 83, 27 L. R. A. 840, 50 Am. St. Rep. 313, 40 N. E. 138; *Quinn* v. *Kansas City, M. & B. R. Co.*, 94 Tenn. 713, 28 L. R. A. 552, 45 Am. St. Rep. 767, 30 S. W. 1036; *Williamson* v. *Louisville Industrial School*, 95 Ky. 251, 23 L. R. A. 200, 44 Am. St. Rep. 243, 24 S. W. 1065.

Powers v. Massachusetts Homœopathic Hospital.

Lowell, District Judge, delivered the opinion of the court.

This is a suit brought by a patient to recover damages for an injury alleged to have been sustained by the negligence of a nurse in the hospital. There was evidence that the plaintiff had a skin unusually sensitive, and that a rubber bag full of hot water was placed by the nurse against her side, and left there for some time. At the trial in the circuit court the learned judge ruled that the plaintiff could not recover, and directed a verdict for the defendant. 101 Fed. 896. To this ruling the plaintiff duly excepted.

That the defendant is a charitable corporation admits of no doubt. This was expressly recognized by the legislature of Massachusetts in chapter 358 of the Acts of 1890, and was decided in *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529, the defendant there differing from the defendant here in no respect material to this case.

The plaintiff was what is sometimes called a "paying patient", the rate of her payment being $ 14 a week. Upon this ground her counsel has sought to distinguish her case from that of a patient in the hospital who pays nothing. In our opinion, the difference is immaterial. As has been said, the defendant was a charitable corporation; that is, a corporation organized exclusively for charity. That the ministrations of such a hospital should be confined exclusively to the indigent is not usual or desirable. Those of moderate means from necessity, and not a few rich people from choice, resort to great charitable hospitals for treatment,—especially in surgical cases. Throughout the world this is the custom in these institutions, whether they are maintained by individual, religious, or municipal charity. From patients who are not indigent, a payment is commonly permitted or required. Commonly, and in the case at bar quite manifestly, this payment does not make full pecuniary compensation for the services rendered. Those who make a considerable payment not infrequently receive in some respects a more expensive service than do those who make a small payment or none at all; but the payment required is usually calculated upon the patient's ability to pay, rather than upon the whole cost of the treatment he receives. That this was the defendant's

Powers v. Massachusetts Homœopathic Hospital

rule appears plainly from its printed form of application, which it required all applicants to fill out alike, whether they paid something or nothing. In this form the inquiry concerning payment was stated as follows: "How much per week applicant can pay",—thus indicating that the amount of the contribution was to be determined, not by the value or cost of the service rendered, but by the ability of the patient to aid the charitable purposes of the hospital. In our opinion, a paying patient in the defendant hospital, as well as a non-paying patient, seeks and receives the services of a public charity.

That such a hospital in its treatment of a rich patient shall be held to a greater degree of care than in its treatment of a pauper is not to be tolerated. Certain luxuries may be given the former which the latter does not get, and this for various reasons; but the degree of protection from unskilled and careless nurses must be the same in both cases. Again, it would be absurd to make the defendant's liability for an accident, like that here alleged, depend upon the payment of that insignificant proportion of the cost of the service rendered which in some cases may properly be required from a poor man or woman. We are of opinion that this case stands as if the plaintiff had been admitted without any payment whatsoever.

We have to determine, then, if a patient admitted to a hospital maintained for charity can recover judgment against that hospital for injuries caused by the negligence of a nurse employed therein. There is a great weight of authority in favor of the defendant in the case put; but the courts have differed so widely in their reasoning that a somewhat extended examination is necessary, both of the cases decided and of the principles upon which they rest. The liability of the defendant for which the plaintiff contends is the liability of a master for the torts of his servant. "The master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." *Barwick* v. *English Joint Stock Bank*, L. R. 2 Exch. 259, 265, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877. At one time it seems that the master's

profit was deemed a necessary element. "The maxim of *respondent superior* is bottomed on this principle,—that he who expects to derive advantage from an act which is done by another for him must answer for any injury which a third person may sustain from it." *Hall* v. *Smith*, 2 Bing. 156, 160, 9 J. B. Moore 226, 2 L. J. C. P. 113. As is said in Pollock, Torts, 4 ed. pp. 67, 88, this rule belongs wholly to the modern law, and no reason for it, at any rate no satisfying one, is commonly given in our books. It is in some sense an exceptional rule to begin with, and is itself subject to several exceptions. With some of these exceptions we have to concern ourselves.

Many cases hold that public or municipal corporations are not liable for some of the torts of their servants, though committed in the course of their service. Thus, in *Benton* v. *City Hospital*, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836, it was said: "The trustees are a body created for the performance of a duty which, under the authority of the statute, the city of Boston has assumed for the benefit of the public, and from the performance of which no profit or advantage is derived, either by the trustees or the city." In this case the trustees were held not liable for injury to a patient caused by the negligence of the Superintendent. To the same general effect are *Richmond* v. *Long*, 17 Gratt. 375, 94 Am. Dec. 461; *Maia* v. *Eastern State Hospital*, 97 Va. 507, 47 L. R. A. 577, 34 S. E. 617; *Sherbourne* v. *Yuba County*, 21 Cal. 113, 81 Am. Dec. 151; *Murtaugh* v. *St. Louis*, 44 Mo. 479. The cases just cited all resemble the case at bar, in that the plaintiff there as here sought to recover for negligence or malpractice in a hospital not maintained for profit; but the principle upon which they rest has no essential connection with hospitals or malpractice, but is applicable equally to many other kinds of damage. Thus the leading case in Massachusetts upon the subject is *Hill* v. *Boston*, 122 Mass. 344, 23 Am. Rep. 332, where the action was for damage caused by the defective construction of a schoolhouse, and the case most commonly arising is probably that concerned with damage caused by a defective highway. In different jurisdictions the liability of municipal corporations for the negligence of their employees is variously limited. Shearm

Powers v. Massachusetts Homœopathic Hospital

and Redf. Neg. secs. 253, 255, 289. See *Detroit* v. *Osborne*, 135 U. S. 492, 34 L. ed. 260, 10 Sup. Ct. Rep. 1012. The liability is determined generally by the laws of the states establishing and regulating the municipal corporations in question. *Detroit* v. *Osborne*, 135 U. S. 492, 34 L. ed. 260, 10 Sup. Ct. Rep. 1012. See *Workman* v. *New York*, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212. The principle upon which the municipality is excused from liability for certain injuries done by its servants is this: The municipality is acting as an agency of the sovereign, and, thus acting, it enjoys some part of the sovereign's immunity from suit. The cases above referred to, however much they resemble the case at bar in some of their facts, yet have no bearing upon its decision. The defendant here is in no sense an agency of the sovereign. It is a public charity, but is not a political or municipal corporation. Yet, as some other cases cited have been referred to in discussing the liability of public charities under private management like this defendant, it has seemed best to refer briefly to the cases in order to distinguish them. Certain English cases have been urged even more specifically. In *Duncan* v. *Findlater*, 6 Clark & F. 894, 1 Rob. 911, it was held that the trustees appointed under a public-road act were not responsible for damage caused by the negligence of those employed in making or repairing the road. The decision might have been rested upon the principle just referred to regarding municipal and political bodies. In delivering his opinion, however, Lord Cottenham said: "The law is stated to be that the road fund is liable for the misconduct of any person employed by the road trustees. This direction assumes that the act done was an act not within the provisions of the statute; that it was not done in consequence of those provisions; for otherwise the direction would be in that respect improper, since whatever is done under the authority of the statute gives no right of action. If that was not so, the result would be that all the damages, though not arising from any act done by the immediate authority of the road trustees, would be liable to be compensated out of the trust fund,—a proposition which certainly cannot be supported by the law which regulates the liability of master and servant."

By this language and other which need not be quoted Lord Cottenham was supposed to have held that the action could not be maintained against the road trustees in their corporate capacity, for the reason that the fund in their hands was impressed with a trust incompatible with its distribution among persons damaged by the negligence of their servant. See *Heriots Hospital* v. *Ross*, 12 Clark & F. 507, a case which will presently be discussed. While the point actually decided in *Duncan* v. *Findlater* has never been overruled (indeed, the House of Lords never overrules its own decisions); yet the principle supposed to be laid down by Lord Cottenham has been distinctly repudiated. *Mersey Docks & Harbour Board* v. *Gibbs*, L. R. 1, H. L. 93, 11 H. L. Cas. 686, 35 L. J. Exch. N. S. 225, 12 Jur. N. S. 571, 14 L. T. N. S. 677, 14 Week Rep. 872. Whatever may be the limit of the liability of a political or municipal body in Great Britain for the torts of its servants, that limit is now in no way determined by any doctrine concerning the application of trust fund. The historical origin of the doctrine may probably be found in *Russell* v. *Devon County*, 2 T. R. 667, 672, 1 Revised Rep. 585, and *Hall* v. *Smith*, 2 Bing. 156, 9 J. B. Moore, 226, 2 L. J. C. p. 113.

There is another class of cases in which the courts of this country have held that a railroad company, having in its regular employ physicians and surgeons whose duty to the corporation requires them to care for the sick and injured among the corporation's employees, is not liable to those employees for the malpractice or other negligence of these medical men. *Chicago B. & Q. R. Co.* v. *Howard*, 45 Neb. 570, 63 N. W. 872; *Clark* v. *Missouri P. R. Co.*, 48 Kan. 654, 29 Pac. 1138; *Quinn* v. *Kansas City, M. & B. R. Co*, 94 Tenn. 713, 28 L. R. A. 552, 45 Am. St. Rep. 767, 30 S. W. 1036; *South Florida R. Co* v. *Price*, 32 Fla. 46, 13 So. 638; *Eighmy* v. *Union P R. Co*, 93 Iowa, 538, 27 L. R. A. 296, 61 N. W. 1,056; *Union P. R. Co.* v. *Artist*, 23 L. R. A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365. The obligation of the railroad has been said to extend no further than the employment of doctors competent to do the work proposed. It has also been said that the doctor is not the servant of the corporation, for the reason that, in treating the patient, he does not

Powers v. Massachusetts Homœopathic Hospital

take his orders from the corporation, but is guided altogether by his own judgment. "The relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other. A master is one who not only prescribes to the workman the end of his work, but directs, or at any moment may direct, the means also, or, as it has been put, retains the power of controlling the work; and he who does work on those terms is in law a servant, for whose acts, neglects, and defaults, to the extent to be specified, the master is liable." Pollock, Torts, 4th ed. p. 72.

There is force in the argument that, by the understanding of both railroad and employee, the latter, in permitting himself to be treated by the railroad's doctor, intrusts his person to the skill of the individual doctor, rather than to any supposed skill of the railroad: provided, at any rate, that the doctor selected by the railroad is skilled in his profession. The class of cases just mentioned has a close resemblance to the case at bar, though there are differences. In the cases cited, the negligence was that of the doctor; in the case at bar, that of a nurse. To hold a nurse to be the servant of the corporation is easier than to hold the doctor; and yet in neither case is the relation altogether that of ordinary service. A nurse, in her treatment of the patient, hardly takes her professional orders from the railroad's superintendent or from his ordinary officials, but rather from the doctor in charge. On the other hand, the railroad is not a charitable corporation, and in tendering medical aid to its employees, even when that is not called for by the contract of employment, may perhaps be supposed to act for purposes not purely charitable. So far as is known, there is no case which affirms the liability of the railroad under the circumstances stated. It has been held that the owners of a vessel, though required by statute to provide medical care and medicines for their passengers, are yet not liable for the malpractice of the doctor employed, provided there was no negligence in selecting him. *Allan* v. *State S. S. Co.*, 132 N. Y. 91, 15 L. R. A. 166, 28 Am. St. Rep. 556, 30 N. E. 482. See *Laubheim* v. *De Koninglyke Nederlandsche S. B. Maatschappy*, 107 N. Y. 228, 1 Am. St. Rep. 815, 13 N. E. 781.

Powers v. Massachusetts Homœopathic Hospital

If the railroad and ship cases rest upon the principle that a doctor is not the servant of the corporation which employs him, they have little bearing on the case at bar. If, on the other hand, they rest upon a principle that those who voluntarily receive medical aid, gratuitously given, cannot recover against the giver except for his negligence in selecting incompetent agents, their bearing is considerable. We come now to the cases precisely or substantially in point. In *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529, it was held that a patient could not recover for damage caused by the negligence or incompetence of a hospital interne or by the negligence of an attending surgeon. In delivering the opinion of the court, Mr. Justice Devens said: "The defendant was a public charitable institution under the laws of the Commonwealth. The object for which it was incorporated was to provide a general hospital for sick and insane persons. Stat. 1810, chap. 94. Its funds are derived from grants and donations made by the Commonwealth, from profits which it is entitled to receive from the Massachusetts Hospital Life Insurance Company and other companies incorporated in the Commonwealth, and from the grants, devises, donations, bequests, and subscriptions of benevolent persons, and from the board of paying patients. While the price of board is placed as low as the funds of the hospital will permit, patients who are there received are expected to pay as nearly as possible according to their own circumstances and to the accommodations they receive. In addition to the accommodations provided for such patients, a certain number of free beds are furnished from the general funds of institution, and from the donations made especially for this object, the occupants of which are not expected to pay anything. Regulations of Hospital, chap. 15, secs. 1 to 4. Of one of these beds the plaintiff was an occupant. The corporation has no capital stock, no provisions for making dividends or profits, and whatever it may receive from any source it holds in trust to be devoted to the object of sustaining the hospital and increasing its benefit to the public, by extending or improving its accommodations and diminishing its expenses. Its funds are derived mainly from public and private charity; its affairs are conducted for a

Powers v. Massachusetts Homœopathic Hospital

great public purpose,—that of administering to the comfort of the sick, without any expectation, on the part of those immediately interested in the corporation, of receiving any compensation which will enure to their own benefit, and without any right to receive such compensation. This establishes its character as a public charity. *Jackson* v. *Phillips*, 14 Allen 539. The fact that its funds are supplemented by such amounts as it may receive from those who are able to pay wholly or entirely for the accommodation they receive does not render it the less a public charity. All sums thus obtained are held upon the same trust as those which are the gifts of pure benevolence. *Gooch* v. *Association for Relief of Aged Indigent Females*, 109 Mass. 558. Nor does the fact that the trustees, through their agents, are themselves to determine who are to be the immediate objects of the charity, and that no person has individually a right to demand admission to its benefits, alter its character. All cannot participate in its benefits; the trustees are those to whom is confided the duty of selecting those who shall enjoy them, and prescribing the terms upon which they shall do so. If this trust is abused, the trustees are under the superintending power of this court as a court of equity, by virtue of its authority to correct all such abuse, and the interest of the public therein—that is to say, of the indefinite objects of the charity—may be represented by the Attorney-General. *Sanderson* v. *White*, 18 Pick. 328, 29 Am. Dec. 591; *Att.-Gen.* v. *Old South Soc.*, 13 Allen, 474." See also *Benton* v. *City Hospital*, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836.

In other cases arising in Massachusetts corporations have been held liable for the expressed reason that they were not public charities. *Donnelly* v. *Boston Catholic Cemetery Asso.*, 146 Mass. 163, 15 N. E. 505; *Chapin* v. *Holyoke Y. M. C. A.*, 165 Mass. 280, 42 N. E 1130; *Newcomb* v. *Boston Protective Department*, 151 Mass. 215, 6 L. R. A. 778, 24 N. E. 39.

Considerations similar to those quoted from *McDonald* v. *Massachusetts General Hospital* were suggested in *Union P. R. Co.* v. *Artist*, 23 L. R. A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365; *Downes* v. *Harper Hospital*, 101 Mich. 555, 25 L. R. A. 602, 45 Am. St. Rep. 427, 60 N. W. 42; *Haas*

Powers v. Massachusetts Homœopathic Hospital

v. *Missionary Soc.*, 6 Misc. 281, 26 N. Y. Supp. 868; *Williamson* v. *Louisville Industrial School*, 95 Ky. 251, 23 L. R. A. 200, 44 Am. St. Rep. 243, 24 S. W. 1065; *Maia* v. *Eastern State Hospital*, 97 Va. 507, 47 L. R. A. 577, 34 S. E. 617; *Perry* v. *House of Refuge*, 63 Md. 20, 52 Am. Rep. 495. As we understand the reasoning, it amounts to this: All the funds of a public charitable hospital are held in trust for a particular charitable purpose. It is a breach of trust to apply them to any other purpose. The payment of damages recovered for the negligence of the hospital servants is not within the terms of the trust. Hence the funds cannot be employed for that payment, and, if the funds cannot be so employed, a bare judgment against the corporation is nugatory, and should not be permitted.

If this proposition is true, then, as suggested by the learned judge who presided at the trial below, it follows that, if the defendant, by its servants, should negligently permit the staircase of a building from which it derives a profit to fall out of repair, it would not be liable for damage suffered by reason of this negligence. It follows, also, that a person walking along the street, and injured by the fall of a stone cornice negligently maintained above the sidewalk, can or cannot recover for the damage suffered, according as the building from which the stone falls is the property of a private individual or of a public charity. Indeed, the principal extends even further than this. There is no less impropriety in diverting funds impressed with a trust for the benefit of individuals than in diverting those impressed with a trust for a public charity. Yet the effectual, though indirect, liability of a private trust fund for the torts of those concerned in its management is undoubetedly recognized. It is true that a suit cannot be maintained against a trustee, as such, for torts committed in the management of the trust property. The suit is brought against the trustee as an individual. The judgment and execution run against him individually. When these are satisfied, however, the trustee is reimbursed from the trust estate, unless individually at fault. *Shepard* v. *Creamer*, 160 Mass. 496, 36 N. E. 475; *Baker* v. *Tibbetts*, 162 Mass. 468, 39 N. E. 350; *Benett* v. *Wyndham*, 4 De G. F. & J. 259. The trust fund is protected from immediate

Powers v. Massachusetts Homœopathic Hospital

levy to satisfy the execution, not because of its complete immunity, but rather from technical reasons connected with the legal estate of the trustee in the property. Its technical immunity affords it no ultimate protection. Indeed, the law on this point is so plain that no case can be found in the Massachusetts Reports expressly sanctioning the payment from a private trust fund of damages for a tort committed in the administration of the trust property, though the practice must be of weekly occurrence in this city of Boston. Practically the trustee generally satisfies the judgment by a payment directly from the trust fund, or compromises the claim without any judgment at all. The merely technical immunity of a private trust fund from execution upon a judgment recovered in an action of tort affords no reason for the real immunity of the funds of a charitable corporation where the technical considerations do not apply. That the funds of a public charity may be diverted to pay for some torts committed in the administration of the fund has often been decided. *Stewart* v. *Harvard College*, 12 Allen, 58; *Bishop* v. *Bedford Charity*, El. & El. 697, 29 L. J. Q. B. N. S. 53, 6 Jur. N. S. 220, 1 L. T. N. S. 214, 8 Week. Rep. 115; *Blaechinska* v. *Howard Mission*, 56 Hun. 322, 9 N. Y. Supp. 679. See *Davis* v. *Central Cong. Soc.*, 129 Mass. 367, 37 Am. Rep. 368; *Gilbert* v. *Trinity House*, L. R. 17 Q. B. Div. 795, 56 L. J. Q. B. N. S. 85, 35 Week. Rep. 30. If those in charge of a hospital unlawfully permit the escape of filth upon neighbouring land, or close a right of way across the premises of the hospital, may not the corporation, in some cases at least, be sued in tort? We think the question answers itself.

If it be sought to charge a trust fund with payment for a tort committed by the trustee and unconnected with the trust property, doubtless the argument just quoted would be unanswerable. For example, if the trustees of the Massachusetts General Hospital hold a separate fund devised for the support and care of the insane at Waverly, that fund cannot be levied upon to satisfy a judgment recovered for an injury committed in the hospital maintained in Boston for medical and surgical cases, and *vice versa*; but, where a charitable corporation is otherwise liable for a tort committed in the administration of its trust, we see no sufficient reason why

the trust fund may not be levied upon its satisfaction of the execution. We are unable, therefore, to agree with the proposition which altogether exempts a trust fund from liability for the torts of those concerned in its administration.

It remains to notice the case of *Heriots Hospital* v. *Ross*, 12 Clark & F. 507, often cited in the reports of this country, though, strangely, little noticed by the Courts of Great Britain. That was a suit against the trustees of a public charitable boarding school in their corporate capacity, for improper failure to admit an applicant to the benefit of the school. Lord Cottenham said: "The question then comes to this,—whether, by the law of Scotland, a person who claims damages from those who are managers of a trust fund, in respect of their management of that fund, can make it liable in payment. It is obvious that it would be a direct violation, in all cases, of the purposes of a trust, if this could be done; for there is not any person who ever created a trust fund that provided for the payment out of it of damages to be recovered from those who had the management of the fund. No such provision has been made here. There is a trust, and there are persons intended to mange it for the benefit of those who are to be the objects of the charity. To give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose." P. 513.

The pursuer was seeking the benefit of the trust fund as one who had been entitled thereto under the trust (though no longer entitled when the case was finally decided), and had been deprived of his rights by the trustees. In such case it may be that the doctrine of the inviolability of the trust fund is applicable, and that one who sues because of a diversion of trust funds cannot himself enforce a diversion. It must be admitted that the language of the opinions diliver-ed by the law lords is not convincing, and that much reliance was placed upon those *dicta* in *Duncan* v. *Findlater* which were denied in *Mersey Docks & Harbour Board* v. *Gibbs*. If the case is rested upon a doctrine that, under no circumstances, can a trust fund be held liable for torts committed in its management, it stands alone in Great Britain.

Powers v. Massachusetts Homœopathic Hospital

In *Hearns* v. *Waterbury Hospital*, 66 Conn. 98, 31 L. R. A. 224, 33 Atl. 595, a case like that at bar, the defendant was held not liable. There was much discussion of the English cases. In dealing with *Mersey Dock & Harbour Board* v. *Gibbs* and similar cases, we think the court did not distinguish clearly between public bodies and private corporations established for public charitable purposes. The exemption from liability declared in the Connecticut case was based upon the theory that "a charitable corporation like the defendant, whatever may be the principle that controls its liability for corporate neglect in the performance of a corporate duty, is not liable, on grounds of public policy, for injuries caused by personal wrongful neglect in the performance of his duty by a servant whom it has selected with due care; but in such case the servant is alone responsible for his own wrong." P. 126, 66 Conn. p. 233, 31 L. R. A., and p. 604, 33 Atl. With the principle laid down thus broadly, we need not agree, in order to decide this case. If a servant of the defendant engaged in the care of Beck Hall, for example, injures a tenant by his negligence, and the act of negligence would render liable an ordinary landlord, it may well be that this defendant would be liable, as suggested by the learned judge before whom the trial was had below.

In *McDonald* v. *Massachusetts General Hospital* it was also said: "It might well be questioned whether any contract could be inferred between the plaintiff and defendant. It has offered to him freely those ministrations which, as the dispenser of a public charity, it has been able to provide for his comfort, and he has accepted them."

The plaintiff's action is an action of tort, and no contract as such need be proved. If a person "once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards." *Osborne* v. *Morgan*, 130 Mass. 102, 103, 39 Am. Rep. 437.

Powers v. Massachusetts Homœopathic Hospital

We assume that there was evidence competent to establish a tort on the part of the nurse for which the plaintiff could recover against the nurse. We assume that there was evidence that the nurse was the servant of the defendant, and that her tort was committed in the course of the defendant's service. If this be true, it is hard to see that the plaintiff need allege or prove any contract in order to recover against the defendant. The first and third counts of the declaration allege a contract, it is true, and we are inclined to agree with the Supreme Court of Massachusetts that the contract there alleged is not proved; but the second count has no such allegations, and we do not wish to dispose of this case upon the ground that the plaintiff has erred in pleading by making an allegation which she has failed to prove, but which she might have omitted altogether. Doubtless there are many torts in which a contract or undertaking by the defendant is a necessary element. "For mere omission a man is not, generally speaking, held answerable. Not that the consequences or the moral gravity of an omission are necessarily less. One who refrains from stirring to help another may be, according to the circumstances, a man of common, though no more than common, good will and courage, a fool, a churl, a coward, or little better than a murderer. But unless he is under some specific duty of action, his omission will not in any case be either an offence or a civil wrong. The law does not and cannot undertake to make men render active service to their neighbours at all times when a good or a brave man would do so. Some already existing relation of duty must be established, which relation will be found in most cases, though not in all, to depend on a foregoing voluntary act of the party held liable. He was not in the first instance bound to do anything at all, but by some independent motion of his own he has given hostages, so to speak, to the law." Pollock, Torts, 4th ed. p. 389. But here the defendant has moved; it has established a hospital, and has employed servants. If a person "once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts." *Osborne*

Powers v. Massachusetts Homœopathic Hospital

v. *Morgan*, 130 Mass. 102, 103, 39 Am. Rep. 437.

As Sir Fredrick Pollock has said in the sentence immediately following the quotation given above: "Thus, I am not compelled to be a parent; but if I am one, I must maintain my children. I am not compelled to employ servants; but, if I do, I must answer for their conduct in the course of their employment." The absence of a contract made with the defendant does not exempt it from liability. If, indeed, there can be shown an agreement by the plaintiff to hold the defendant harmless for the acts of its servants, then it follows that this action cannot be maintained, and we agree with the learned judge of the court below that this agreement arises by necessary implication from the relation of the parties. That a man is sometimes deemed to assume a risk of negligence, so that he cannot sue for damages caused by the negligence is familiar law. Such is the case of common employment, and such are the cases of athletic sports and the like, put by Pollock on page 150 *et seq*. Such is the case at bar. One who accepts the benefit either of a public or private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity; at any rate, if the benefactor has used due care in selecting those servants. To paraphrase the illustration put by the learned judge before whom this case was tried, it would be intolerable that a good Samaritan, who takes to his home a wounded stranger for surgical care, should be held personally liable for the negligence of his servant in caring for that stranger. Were the heart and means of that Samaritan so large that he was able, not only to provide for one wounded man, but to establish a hospital for the care of a thousand, it would be no less intolerable that he should be held personally liable for the negligence of his servant in caring for any one of those thousand wounded men. We cannot perceive that the position of the defendant differs from the case supposed. The persons whose money has established this hospital are good Samaritans, perhaps giving less of personal devotion than did he, but, by combining their liberality, thus enabled to deal with suffering on a larger scale. If, in their dealings with their property appropriated to charity, they create a nuisance by themselves or by

their servants, if they dig pitfalls in their grounds and the like, there are strong reasons for holding them liable to outsiders, like any other individual or corporation. The purity of their aims may not justify their torts; but, if a suffering man avails himself of their charity, he takes the risks of malpractice, if their charitable agents have been carefully selected.

Powers v. Massachusetts Homœopathic Hospital

We have thus indicated the grounds upon which rests, in our opinion, the defendant's exemption from liability in this case. Though we feel constrained to differ from the reasoning followed by some other courts in reaching the same conclusion, we are not unmindful that the identity of conclusion reached, though by different roads, is a strong proof of its correctness. Doubtless a weight of authority is more overwhelming if it is identical in reasoning as well as in result, but identity of result is in itself no mean argument for its justice.

We come now to the few cases opposed to the weight of authority just referred to. The most important of these is *Glavin* v. *Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675. There the declaration alleged that, in consideration of the plaintiff's promise to pay reasonable compensation, the defendant promised to supply him with such surgical and medical attention as were necessary for the care and cure of his injuries, but that the defendant's servants neglected properly to care for the plaintiff, or to supply proper surgical treatment to him, and "conducted" so carelessly and improperly and unskilfully that his arm had to be amputated. The declaration further alleged that the defendant, regardless of the obligation incumbent upon it, neglected to provide competent officers and servants to treat the plaintiff. Upon the evidence, the plaintiff's case was that he had been injured by the malpractice of an interne before the arrival of an experienced surgeon, who should have been summoned at once. There seems to have been some evidence that the interne was carelessly selected by the defendant, though this evidence is not stated in the report. The defendant was a public charitable institution, like the defendant in this case. The court held that the plaintiff could recover. Chief Justice Durfee, who delivered what appears to have been the

Powers v. Massachusetts Homœopathic Hospital

opinion of the Court, first discussed *Holliday* v. *St. Leonard*, 11 C. B. N. S. 192, 30 L. J. C. P. N. S. 361, 8 Jur. N. S. 79, 4 L. T. N. S. 406, 9 Week. Rep. 694, and showed that it had been overruled, and so afforded no support to *McDonald* v. *Massachusetts General Hospital*, which last case had been followed by the trial judge in *Glavin* v. *Rhode Island Hospital*. He next stated that a surgeon is not ordinarily the servant of a hospital, though the hospital may be liable for the torts of a surgeon carelessly appointed by it. So far as the interne acted as a surgeon, the learned Chief Justice said that he also was not the defendant's servant, but that, in summoning or neglecting to summon a surgeon to treat the plaintiff, he did act as the defendant's servant. The defendant was liable for his malpractice if he was improperly appointed, and, in any case, for his neglect to summon a competent surgeon. The learned judge then pointed out that the defendant was not a public or municipal corporation, and denied the doctrine of the inviolability of trust funds, which we have already dealt with. With much of the reasoning of the court we agree, and we do not find it necessary to dissent from the result so far as concerns the liability of a corporation like this defendant for the consequences of its negligent selection of agents and servants. Our difference of conclusion regarding its liability for the torts of its properly chosen servants in the treatment of patients has already been shown to rest upon reasoning which was not brought to the attention of the Supreme Court of Rhode Island. Although the decision in *Glavin* v. *Rhode Island Hospital* is to-day the law in Rhode Island, so far as the matter is unaffacted by statute, yet it is to be noticed that the legislature promptly changed the law in reference to all institutions like the defendant. We do not deem this fact to have an important bearing upon the case at bar, though it indicates that the sense of the community is shocked by holding a public charitable hospital liable for a servant's negligence in caring for a patient.

In *Ward* v. *St. Vincent's Hospital*, 39 App. Div. 624, 57 N. Y. Supp. 784, the action was for a breach of an express contract by the defendant to furnish the plaintiff with a skilful, competent, and trained nurse. If this contract was proved, of course the defendant was liable for the damage

resulting from its breach, and that case has no bearing upon this. In *Donaldson* v. *General Public Hospital*, 30 N. B. 279, the declaration alleged damage caused by malpractice in letting the disease of a patient's eye progress to the destruction of the eye. The defendant demurred, and the majority of the court overruled the demurrer. One judge, in his opinion relied upon an express contract which, so far as can be learned from the report, was not alleged in the declaration. The physicians were considered the servants of the defendant. The ground of the decision appears to have been that the defendant could escape its liability only by maintaining successfully the principle supposed to be laid down by the *dicta* in *Duncan* v. *Findlater*. As those *dicta* had been denied by the highest authority, the plaintiff prevailed.

For the reasons above given, and in spite of the cases of *Glavin* v. *Rhode Island Hospital* and *Donaldson* v. *General Public Hospital*, we are of opinion that the defendant here was not liable to the plaintiff, and that the instructions given at the trial were correct. We are not called upon to decide if the defendant would have been liable upon allegation and proof that the nurse was incompetent, and that this incompetence was, or ought to have been, known to the defendant. As our conclusion agrees with that reached by the Supreme Court of Massachusetts, we need not consider how far we are bound by its decisions.

The judgment of the Circuit Court is affirmed, with costs.

Petition for writ of certiorari denied October 21, 1901.

Saunders v. Sinniah Kangany

SAUNDERS *vs.* SINNIAH KANGANY.

No. 2,686, P. C. Nuwara Eliya.

Present: Wood Renton, J.

Argument: *27th August, 1908.*

Judgment: *31st August, 1908.*

Master and servant—Labour Ordinance (No. 11 of 1865), sec. 11—Staleness of prosecution—Set off against wages—"Advances"—Ordinance No. 13 of 1889, sec. 6 (3)—Assent to appropriation of wages.

The right of prosecution for any offence under the Labour Ordinance is barred only by the lapse of 20 years from the time of the commission of the offence.

The staleness of a charge is a ground of which a court can take account only in estimating the question of punishment.

The word "advances" in sub-sec. 3 of sec. 6 of Ordinance No. 13 of 1889 refers to advances by way of anticipated wages, and not to a loan or to a debt due on a promissory note by a kangany in respect of his tundu.

Jacob v. *Vellaiden Kangani* [(1893) 1 N. L. R. p. 42] and *Sinclair* v. *Ramaswami* [(1893) 1 N. L. R. p. 43] followed.

P. C. Nawalapitiya, 24,726 [Browne's Notes on the Labour Ordinance p. 51 (S. C. M. 19th September, 1898)] disapproved.

Implied assent on the part of a cooly to the appropriation of his wages is sufficient.

H. J. C. Pereira for accused-appellant.

No appearance for respondent.

c. a. v.

JUDGMENT.

Wood Renton, J.—In this case the appellant was convicted under sec. 11 of the Labour Ordinance No. 11 of 1865 of having deserted Marigold Estate, of which the complainant, Mr. Saunders, is Superintendent, and he was sentenced by the learned Police Magistrate to undergo one month's rigorous imprisonment.

On his behalf Mr. H. J. C. Pereira took a variety of points, some of which are of considerable legal and general interest. I propose to deal with them in turn.

In the first place, he contended that the prosecution ought to have been dismissed because of its staleness. The

Saunders v. Sinniah Kangany

appellant is alleged to have quitted the estate on the 9th day of August, 1907, and although complainant was aware of his absence, no summons was issued under the Ordinance till the 29th day of May, 1908. In support of this contention Mr. Pereira referred me to a decision by Mr. Justice Lawrie in P. C. Nawalapitiya, 24,726, S. C. Mins. of 19th September, 1898, reported in Browne's Notes on the Labour Ordinance at p. 51, in which the learned judge acquitted a labourer on a charge of desertion on the ground that while he had left his employer's services on the 28th April, 1895, the prosecution against him was not instituted till March, 1898. With all respect I am unable to follow this decision. Sec. 444 of the Criminal Procedure Code provides that the right of prosecution for any offences, other than that of murder or treason, shall be barred (in the absence of special legislative provision) by the lapse of twenty years from the time of its commission. If the legislature propose to amend the Labour Ordinance, it would be, I think, an advantage for both employer and employed if a statutory limit for the presentation of charges under the Labour Ordinance were created; but in the absence of any such enactment at present, I hold that the staleness of a charge which is presented within the period prescribed by the Criminal Procedure Code is a ground of which a court can take account only in establishing the *quantum* of punishment. I find that Wendt, J., took the same view in *Bliss* v. *Sandai*, P. C. Gampola, 38,416, S. C. Mins., 28th February, 1907.[1]

---

[1] BLISS *vs.* SANDAI.

No. 38,416, P. C. GAMPOLA.

Present: WENDT, J.

28th February, 1907.

Bawa for complainant-appellant.

JUDGMENT.

WENDT, J.—The complainant, with the sanction of the Attorney-General, appeals against the acquittal of the accused, a cooly woman, whom he had charged with unlawfully quitting his service. The ground of the acquittal is that the prosecution was "stale", the offence having been committed on 23rd April, 1904, and the prosecution entered on 12th December, 1906. The Magistrate, although he says that as a rule he does not issue a warrant after the lapse of

Saunders v. Sinniah Kangany

In the second place, Mr. Pereira urged that the evidence showed that the appellant had been driven away from the estate by the complainant himself, and in that connection he referred me to the case of P. C. Panvilla, 14,568, Grenier (1873—74) p. 85, in which Mr. Justice Stewart interpreted the words "he told me to go", used by an employer towards a labourer, as a direction to quit his service. If it were necessary now to decide the point, I should not be prepared to hold that the complainant intended, or that the appellant understood him to intend, in the present case to terminate the contract of service.

But, on the third point urged by Mr. Pereira, I think he is entitled to succeed. It is admitted and proved that at

---

one year in prosecutions under the Labour Ordinance, granted a warrant in the present instance because the prosecutor desired to have a decision as to when a prosecution is stale. I do not see why he did not take the usual course of issuing a summons, especially as there was no allegation that the cooly's attendance could not be secured on a summons. It is necessary always to remember that the rule is that a summons is the regular process, and that a warrant is justified only in the exceptional case of its being shown that such summons would be ineffectual.

On the facts, the Magistrate finds in favour of the prosecution, reserving, however, "the question of *bona fides* on the part of the accused". It is, therefore, necessary to decide whether there is any bar to the prosecution on the ground of "staleness". This is not a statutory bar; there is nothing about it in the Labour Ordinances, and we have no general enactment similar to that contained in sec. 11 of the Summary Jurisdiction Act, 1848, directing that in default of express provision in the case of a statutory offence the prosecution shall be commenced within six calendar months. The Criminal Procedure Code (sec. 444) only imposes the limitation of 20 years on prosecutions for all crimes and offences (murder and treason excepted) for which special provision is not made by law. It is usual in statutes creating offences—specially offences not *mala in se*, such as are created by the Labour Ordinance of 1865, which renders the breach of a contract of service criminally punishable—to prescribe a period within which prosecutions have to be commenced, and it is desirable that the legislature should enact some such limitation in the case of labour offences. No hardship to the employer would be involved, because such an enactment would not mean that a defaulter could not be punished after the prescribed time, but only that the prosecution against them must have been begun within that time. And such a limitation is reasonably necessary in the interests of the servant. The legislature, however, as I have said, has enacted no limitation, and unless a bar be imposed by the alleged "staleness" of this prosecution, it must be determined on the merits of the proof.

The Magistrate in dealing with the question of staleness says that each case must depend on its own circumstances and in dismissing the present charge he follows the decision of Lawrie, J., in *White* v. *Meenatchy*, S. C. M. 19th September, 1898, referred to in Browne's *Notes on the Labour Ordinance*, p. 51. There the prosecution was entered on 30th March, 1898, for an offence laid in April, 1895; the warrant was renewed from time to time, and accused was only

Saunders v. Sinniah Kangany

the time when appellant left Marigold Estate his wages for more that 60 days were overdue, and that they had in fact been set off against the amount due by him on the payment of his tundu. I am clearly of opinion that no set off of this description comes within the purview of sec. 6, sub-sec. 3, of the amending Labour Ordinance No. 13 of 1889. I entirely agree with Mr. Justice Withers in the case of *Jacob* v. *Velaiden Kangani* [(1893) 1 N. L. R. p. 42] and with Mr. Justice Lawrie in the case of *Sinclair* v. *Ramasami Kangani* [(1895) 1 N. L. R. p. 43)] that the word "advances" in the section that I have cited refers to advances by way of anticipated wages, and not to a loan or to a debt due on a promissory note by a kangany in respect of his tundu. There is no evidence in the present case that the Kangany assented

---

brought before the Court in July, 1898. The evidence of the complainant shewed that she had been engaged on 2nd April, 1895, and had deserted on 25th April. After "some time" her whereabouts were discovered, and she was brought back from Sinnapitiya Estate on two occasions, but did not work. The Head Kangany deposed that she had in that fashion been brought back four times from Sinnapitiya Estate, but had never resumed work. He stated that she had bolted in May, and again in July; and for the last time "in 1895 or 1896". Lawrie, J., found it impossible to reconcile this evidence with that of the Superintendent of Sinnapitiya, who stated that the woman had come to his estate for the first time in March, 1898, with a *tundu* from Ingestra Estate. The learned Judge proceeded: "There is no prescription or limitation of the time in which criminal prosecutions must be brought, but it is a rule of practice and of justice that prosecutions must be brought and investigated as soon as possible after the offence is committed. Stale prosecutions are discouraged. A magistrate should not issue a warrant for the arrest of a man charged with hurt or theft, etc., three years after the alleged offence unless there was good reason shewn to him. Here if the Head Kangany of Paragala can be believed, this woman was known to be on Sinnapitiya, and was brought back four times. After so much delay and after bringing her back so often it is not just to renew an old charge." If the learned Judge, for whose opinion I entertain the highest respect, intended to lay down that, assuming Meenachy was guilty of the offence charged, she could not be convicted because the prosecution was instituted so late, I regret that I must differ from him. Doubtless the delay would justify the refusal of a warrant in the first instance, unless the delay were explained, but the same objection would not apply with equal force to summons. Doubtless also, when arriving at a verdict whether the accused committed the offence or not, the Court may hold that the evidence was so discredited by the delay that it failed to bring guilt home to the accused. But that is an entirely different thing from saying that a deserting labourer cannot be punished for an offence of which he is guilty because the complaint was not lodged within what the court considers a reasonable time of the commission of the offence. The legislature has not thought fit to meet that, and I cannot say that it is the law.

I therefore set aside the acquittal of the accused and send the case back so that the Magistrate may dispose of it according to law.

Saunders v. Sinniah Kangany

expressly to the appropriation in question. If there had been any evidence of implied assent, it would have been necessary for me to consider whether that is sufficient to justify an appropriation under the Labour Ordinance. In the case of *Scovell* v. *Mootammah* [(1906) 9 N. L. R. p. 83] I myself held that implied assent was sufficient. I understand, however, that in the later case of *Ogilvy* v. *Carupen*[2], for a report of

---

[2] OGILVY *vs.* CARUPEN.

No. 10,369, P. C. KANDY.

Present: MIDDLETON, J.

10th September, 1907.

H. A. Jayawardene for accused-appellant.

vanLangenberg in support.

JUDGMENT.

MIDDLETON, J.—This is an appeal from a conviction for desertion under sec. 2 of Ordinance 16 of 1905, for quitting service without leave or reasonable cause by a cooly.

The defence set up was that he had reasonable cause to leave the prosecutor's service inasmuch as his wages were 60 days overdue.

The defendant left the service on 3rd June, and his wages for March had not then been paid, but it was alleged by the complainant that with defendant's consent his wages for that month had been appropriated to the part payment of a debt alleged to be due by the defendant to the head kangany, and that by such agreed appropriation his wages for March must be considered as paid.

In the case of *Scovell* v. *Mootammah* (9 N. L. R p. 83) my brother Wood Renton, J., held that the cooly who claimed reasonable cause for quitting service on the ground that 60 cents of her wages overdue and unpaid for upwards of 60 days was not justified in so doing inasmuch as she had impliedly assented to the adjustment of her indebtedness to the Kangany by the Superintendent's appropriating her wages to the payment of his debt, and that she accepted subsequent payments without demur and left the estate without making any claim for the balance due to her and did not come forward at the trial to give her version of the matter. There the appropriation was made in virtue of sub-sec. 3 of sec. 6 of Ordinance No. 13 of 1889, which imperatively ordains the debit to be made. I think also it was clear that the defence was a mere specious one.

Now, I have no doubt that an Indian cooly like any other human being not under disability may consent to his wages or pay being appropriated to the payment of any debt he likes or even given away if he wishes.

Under sec. 6 sub-sec. 3 of Ordinance No. 13 of 1889 the employer has power to debit the cooly without his consent with the amount of all advances of money made to him, and with the value of all goods, clothes or other articles supplied to him *during the period of service* for which his wages are computed and which the employer is not liable at law to supply at his own expense, when computing the amount of wages due to him for any period of service.

which I am indebted to an excellent summary of the decisions under the Labour Ordinance, a copy of which Mr. Akbar has kindly presented to me, and which I hope will see the light in a more extended and authorized form, it was held by Mr. Justice Middleton that proof of express consent in such cases was indispensible. I am not quite clear whether Mr. Justice Middleton intended to go so far as this, for in an earlier part of his judgment he says that he has no doubt that an Indian cooly, not under disability, may consent to an appropriation of his wages in any form he pleases. If all that was intended to be decided in *Ogilvy* v. *Carupen* was that it was desirable for planters to furnish themselves with proof of express consent, or that the courts should insist on implied consent being clearly established, I entirely agree with the decision. But, if it went further and enunciated the doctrine that, in the absence of proof of express consent, it is not competent for the courts even to look at evidence

Saunders v. *Sinniah Kangany*

Now in the present case I understood it was admitted that the debt against which the defendant's wages were appropriated did not fall under the amounts specified in sub-sec. 3 and, therefore, it could only be appropriated with the cooly's consent.

It was certainly not proved that it was a debt which came within the terms of that sub-section.

The question, I think, is whether in the present case the cooly's consent appears to have been so clearly obtained to this specific appropriation that he cannot now deny that he was aware that his wages for the month of March had thereby been paid and consequently that he had no reasonable cause for quitting service without leave and was therefore criminally liable.

The evidence as to the defendant's consent to this appropriation was that of Mr. Ogilvy, who stated that it was the custom of the estate to pay two months' wages, and then take one month into advance account.

The coolies were asked on the 3rd August by the tea-maker and on the 5th and 8th April by the kanakapulle in the presence of Mr. Ogilvy, who understands Tamil, whether they wanted their pay. The accused, who was present, did not give in his name. Consequently his wages for March were taken to advance account.

There is no evidence to shew that the defendant consented to the specific appropriation now relied on or that anything was done to stamp that fact as an accomplished agreement on the mind of the cooly which he could not afterward deny.

The man was not called up nor spoken to personally about the appropriation, nor asked if he consented, nor was he subsequently told that such a specific appropriation had been made and entered in the estate accounts.

As a matter of fact it should not be done I think until the man's consent is clearly obtained.

I think also it would be extremely dangerous to carry the doctrine of implied assent to the extent demanded in this case.

Saunders v. Sinniah Kangany

of implied assent, I can only say with the greatest respect that I think that this view of the law is not only not warranted by the Ordinance, which has indeed nothing to do with the question, but is contrary both to Roman Dutch and to English Law. There is, however, no evidence of implied assent in the present case.

On the grounds I have stated, I set aside the conviction and acquit the accused.

It seems to me, therefore, that the defendant had no sufficient reason to suppose that with his consent his wages had been specifically appropriated by his employer to the Head Kangany's debt.

If he had no sufficient reason to think this, in my opinion he cannot be held criminally liable for quitting service without reasonable cause.

It may be said that he had at any rate reason to suppose that his wages would be and were set off against advances; but in my opinion until the man personally and indvidually was called upon and acquainted with the proposals of the Superintendent he had reason for saying that he did not consent to the appropriation in question where such consent is required.

In my opinion in every case where any appropriation of wages is made, either specifically with consent or as of right under sub-sec. 3 of sec. 6, the individual cooly should as a matter of equity and fair dealing be made personally acquainted with the specific proposals of the Superintendent and have his opportunity of assenting or objecting.

Proof of his indubitable consent in a case like the present is in my judgment indispensible, and should be provided for accordingly.

The defendant here was not called as a witness to give his reason, but I do not think the evidence given by Mr. Ogilvy required him to do so.

In my opinion this conviction must be set aside and the defendant discharged on the ground that it is not proved that he consented to the specific appropriation of his wages for March, so as to preclude him from getting up the defence that he had no sufficient reason to believe his wages for that month were paid and therefore that he was entitled to quit service without leave.

It is not necessary under the circumstances to consider the question of the defendant's minority.

JAYAWARDENE *vs.* THEGIS *et al.*

No. $\frac{1181}{1386}$, D. C. CHILAW.

Present: LAWRIE, J., & BROWNE, A. J.

ARGUMENT: 21*st October*, 1897.

JUDGMENT: 3*rd November*, 1897.

*Execution of decree—Resistance—Enquiry under sec. 327 of the Civil Procedure Code—*Onus *of proving title.*

In an enquiry under sec. 327 of the Civil Procedure Code the burden lies on the judgment-creditor of proving his title.

Dornhorst for plaintiff-appellant.

Wendt for defendants-respondent.

c. a. v.

JUDGMENT.

LAWRIE, J.—I take it as proved that it was on Ehetugahawatte as described in the plaint that the Fiscal's Marshal was or fancied he was obstructed when he went to enforce the writ of possession against Thegis and Lama Etana.

I rather think that the District Judge was wrong when he held that the obstruction was by persons other than the judgment debtors and that they claimed in good faith, for we now learn from one of the so-called obstructionists that she really had no claim, and did what her brother told her to do, but it is too late to act on that view of the respondents' position.

The learned District Judge laid the burden of proof on the defendants, relying on a decision of this Court reported in 2 Ceylon Law Reports, page 110.

I said I thought the *onus* lay on the plaintiff. My brother Withers was inclined to the other opinion; but I am permitted by him to say that he now holds the burden to be on the plaintiff. He says: "sec. 377 sub-sec. (b) applies to the petition under sec. 325 before it is converted into a plaint under sec. 327. The obstructor has so far shewn cause by satisfying the judge that he is a *bona fide* claimant in possession. He has so far met the petition successfully.

Jayawardene v. Thegis

Then the petition is dubbed, a plaint and then there is a summary trial without further pleadings. Possession is *prima facie* right; therefore the decree-holder should make out a superior title under sec. 327 and should begin."

So fortified by the opinion of my brother, I adhere to my previous opinion that in the enquiry under sec. 327 on the judgment-creditor lies the burden of proving his title.

However, the District Judge laid the burden on the defendants, and he has decided in their favour on grounds which seem to me untenable, although they are clearly expressed in a judgment of more than ordinary care and ability.

It is to me very clear that the respondents were not in possession prior to the planting agreement by the plaintiff to Thegis.

The learned District Judge puts great reliance on the evidence of Mr. Corea; but it is I think plain that he was speaking of Kadurugahawatte, not of Ehetugahawatte. It is admitted that the respondents worked on Kadurugahawatte, and it is also admitted that that is a land distinct from Ehetugahawatte.

Batohamy, the 3rd respondent, said: "At the time of my earliest recollections I lived in Kadurugahawatte till I went to Colombo with Mr. Alexander Guneratne. I came from Colombo two years ago. I was with Mr. Guneratne 18 months. When I returned I went to live at Ehetugahawatte, as it was a land planted by my father and my elder brother .... My mother died in Colombo. She went to Colombo from Kadurugahawatte six or seven years ago. I remember the day the Fiscal's Marshall came. I did not resist him; only Thegis and Lama Etana............... I did not get any produce before going to Colombo, nor did I get any money in Colombo from the sale of nuts."

The other respondents did not give evidence.

The husband of Lama Etana said he had been taken by his wife to Ehetugahawatte only two years before, and that before that they lived on Kadurugahawatte with his wife and family.

The Police Officer of Kurukkunda said of the respond-

ents that they had been on Ehetugahawatte for the last two or three years.

Therefore I feel sure that Mr. Corea was speaking of Kadurugahawatte when he spoke of the land on which the respondents lived with their mother.

With this evidence before me I am of the opinion that the decidedly slender evidence led by the plaintiff has been supplemented by the evidence of the respondents, and shows that their claim to the land Ehetugahawatte was ill-founded. I would set aside; give judgment for the plaintiff with costs.

BROWNE, A. J.—I agree. The litigation appears to have been fought purely in the interest of the 1st and 2nd defendants, who carefully refrain from shewing how they can avoid the estoppel of the lease of October, 1893 which has four years yet to run.

PIERIS *vs.* KANKANI.

NO. 13,402, P. C. HATTON.

Present: BROWNE, A. J.

15th August, 1893.

Giving false information to public officer—Cause of injury or annoyance—Enquiry by Police Inspector—Penal Code, sec. 180.

A mere enquiry by an Inspector of Police whether an assertion is true or not would not be a cause of such injury or annoyance to innocent persons as sec. 180 of the Penal Code contemplates.

Dornhorst for appellant.

Wendt for respondent.

JUDGMENT.

BROWNE, A. J.—Granted that the information which accused gave to Inspector Pieris was to his knowledge or belief false, complainant has to establish that the appellant intended thereby to cause, or knew it likely that he would

Pieris v. Kankani thereby cause, the Inspector to use his lawful power to the injury or annoyance of someone.

I have looked in vain through the complaint, charge, evidence, and finding to discover any particularization of what was the lawful power which the Inspector did use or could have used to such injury and annoyance. The offences of forgery and abetment thereof not being cognizable, no arrest therefor could be made without warrant, and I hardly consider that mere enquiry whether an assertion is true or not would be a cause of such injury or annoyance to innocent persons as the section contemplates. But there is no direct evidence whatever of any such intent—no request that the Inspector would do or not do anything—go to the estate, arrest, or institute a criminal proceeding. The intent I believe to have been that stated by the accused himself—to lay the foundation for a future repudiation of the transaction, and not that any action should be taken by the Inspector of Police thereon.

WALLIAMMA *et al.* *vs.* MUTTU NADAN.

No. 7,218, D. C., Negombo.

Present: Wendt, J., & Grenier, A. J.

7th October, 1908.

Action under sec. 247 *of the Civil Procedure Code—Execution of mortgage decree—Claim by purchaser—Subsequent action by decree-holder—Joinder of mortgagor as party defendant—Civil Procedure Code, sec.* 640.

The plaintiffs having recovered judgment against their debtor in a mortgage action, together with their mortgage decree, issued a writ of execution and seized the mortgaged land, whereupon the defendant in this action claimed the land by virtue of a conveyance from the mortgagor. The claim was upheld, and the plaintiffs brought the present action, in which they alleged that the amount of their mortgage debt was still unpaid, and prayed that the land be declared liable to be sold under the mortgage decree.

Held: That the plaintiffs' prayer was an incorrect form of prayer.

Slema Lebbe v. *Banda* [(1898) 1 A. C. R. p. 72] followed.

The Courts have always displayed a readiness to regard such an action as an hypothecary action and to give the plaintiff relief by declaring that if the defendant does not elect to pay the mortgage debt the land should be sold to realise it.

Also: That in such an action it was not necessary to add the mortgagor as a party defendant, since the mortgagees had already complied with sec. 640 of the Civil Procedure Code by obtaining a decree against the mortgagor.

de Soysa for appellant.

No appearance for respondent.

Judgment.

Wendt, J.—I think this appeal must succeed. The facts out of which it arises are as follows :—The appellants having recovered judgment against their debtor Nadan on a mortgage dated 5th November, 1901, together with the usual mortgage decree, issued a writ of execution and seized the mortgaged land. Whereupon the present defendant claimed the land by virtue of a conveyance from the mortgagor dated 12th January, 1906, which we are informed was anterior to the mortgage

Walliamma v. Muttu Nadan

action. The claim was necessarily upheld because the present defendant was not bound by the decree. The plaintiff thereupon brought the present action in which he alleged that the amount of the debt was due and was secured upon the property and prayed that the land be declared liable to be sold under the mortgage decree. That prayer, as pointed out by Bonser, C. J., in the case of *Slema Lebbe* v. *Banda*, Appeal Court Reports p. 72, was an incorrect form of prayer, for the reason I have already mentioned, that the decree did not bind the present defendant. The Courts, however, have always displayed a readiness to regard such an action as an hypothecary action, and to give the plaintiff relief, by declaring that if the defendant did not elect to pay the mortgage debt the land should be sold to realise it. The learned District Judge expressed his willingness to take the same course here, but he thought that it was necessary that the constitution of the action should be amended by adding the mortgagor as party defendant. There I think he was wrong. He was perhaps thinking of the enactment in sec. 640 of the Civil Procedure Code to the effect that "every mortgagee or a person entitled to bring any action on the realization of the money secured on a mortgage shall sue the mortgagor as defendant whether he is or is not in the prossession of the property mortgaged". That enactment does not in my opinion mean that both the mortgagor and his successor in the title to the land should be party to one and the same action. It only means that the mortgagor has to be given the opportunity of contesting the existence of the debt and the liability of the land for it. The mortgagees have already complied with sec. 640 by obtaining a decree against the mortgagor which completely barred him, and it does not appear in what way the present defendant will be embarrassed in establishing defences open to him by the absence of the mortgagor from this action. The order appealed against is therefore set aside so far as it directs the addition of the mortgagor as defendant, and casts the plaintiff in the costs of the action up to date. The plaintiff will hav his costs of the hearing in the Court below and of this appeal.

GRENIER, A. J.—I agree.

PERERA *vs.* AWISHAMY *et al.*

No. 3,621, D. C., Kalutara.

Present: Wendt & Wood Renton, JJ.

Argument: *21st September, 1908.*

Judgment: *26th September, 1908.*

Evidence—Admittance of evidence after close of case—Documents tendered in evidence—Production—Civil Procedure Code, secs. 111-114, *&* 154.

Where a judge, after both sides had closed their respective cases, proceeded to give the defendant's proctor an opportunity of explaining a deed, called for, for his own information, certain other deeds and permitted the plaintiff's proctor to file an additional list of documents,

Held: That such proceedings were irregular.

Also: That except under special circumstances, the judge should refuse to record anything regarding a document unless it is produced and tendered so that it can be marked and received in evidence in the manner directed by sec. 154 of the Civil Procedure Code.

If for sufficient reason documents are not ready to be tendered in the regular way when their contents are first spoken to, the special leave of the Court should be obtained for their subsequent production.

Bawa for defendants-appellant.

H. J. C. Pereira for plaintiff-respondent.

c. a. v.

Judgment.

Wendt, J.—I agree to the dismissal of the appeal.

I desire specially to associate myself with what my learned brother has said as to the irregularities connected with the production and tender of the documentary evidence. The trial concluded on 21st February, 1908, and the learned District Judge reserved judgment until 28th February. Although the record at the close of plaintiff's case is "documents put in", the plaintiff's list of documents (p. 70) is dated 25th February. These are the copy tax receipts. If for sufficient reason they were not ready to be tendered in the regular way when their contents were first

Perera v. Awishamy

spoken to, the special leave of the Court should have been obtained for their subsequent production. Except under special circumstances, the judge should refuse to record anything regarding a document unless it is produced and tendered so that it can be marked and received in evidence in the manner directed by sec. 154 of the Civil Procedure Code.

I also agree with every word my learned brother has said as to the irregularity, in the circumstances disclosed in this case, of permitting first one party and then the other to supplement his case by the production of additional evidence.

WOOD RENTON, J.—This is a suit for the partition of a land called Kalippewatte situated at Kalutara. The respondent alleges that it was originally owned by Panis Silva, Telanis Silva, and Gunaris Silva, by virtue of a deed (P1) dated 23rd July, 1875, each in the proportion of an undivided 1/3 share. Panis married Nonohami and had issue (i) the 1st defendant, who married the 2nd, (ii) Missi Nona, mother of the 3rd and 4th defendants, and (iii) William. William transferred his share by deed (P9) of 2nd September, 1902, to John Wickramanayaka, who in turn, by deed (P5) of 13th February, 1903, transferred it to the 6th defendant. The respondent admits that the share of Telenis vested in his widow, the 5th defendant, and her children, the 6th to 10th defendants. The 5th to 10th defendants alone appeal. Gunaris was twice married—(1) to Gunarishami, whose daughter Agneshami and her husband Mois Sinno sold 1/6 and 1/24 shares to the respondent by deed (P2) of 19th November, 1906; (2) to Nonohami, whose daughter Dona Ana Hami and her husband sold another 1/24th share to the respondent by deed (P3) of 19th November, 1906. Gunaris died, and his widow Nonohami contracted a second marriage with Siman Silva, the 12th defendant; and they by deed (P4) of 24th November, 1906, sold a 1/12th share to the respondent, who claimed therefore the whole of Gunaris' 1/3rd share. The appellants—the widow and children of Telanis—allege that the land in question was originally the property of one Hapan Andris Silva. His two sons Telanis and Saisohamy divided his whole estate by agreement between them, Telanis taking the land in Kalutara, including Kalippewatte, in consideration of his re-

linquishing in favour of Laisohamy all his interest in the lands in Morogalla. The appellants, therefore, as the widow and children of Telanis, claim the entirety of Kalippe-watte. Two issues were framed—(i) was the land the property of Gunaris, Telanis, and Panis; or was it exclusively the property of Telanis' father Andris? (ii) At the date of the transfers in the respondent's favour had his grantors obtained a prescriptive title to what they purported to transfer?

Evidence was adduced on both sides, and ultimately the learned District Judge decreed a partition in terms of the plaint, casting the appellants in costs consequent on their opposition. The grounds of this decision may, I think, be fairly summarised thus:—The respondent's deed (P1) of 23rd July, 1875, shows that at the date of its execution the land Kalippewatte had been cut up into divided portions. It refers back to a deed of 13th October, 1840—of which the respondent has put a copy in evidence (P8), and by which Don Moises Appuhamy, claiming by right of maternal inheritance presumably—for the point is not clear—under a partition deed—no longer available—of 25th February, 1819—transferred an undivided share to Don Miguel Silva. In D. C., Kalutara, No. 26,731, a mortgage decree was entered in 1873 on a bond of 1868 against the heirs of Miguel Silva declaring this very land bound and executable. The deed of 23rd July, 1875, was executed by Miguel Silva's heirs for the purpose of settling the amount due on the decree, and the share, of which it disposed, was a divided share. These facts, says the learned Judge, in effect are inconsistent with the claim of Hapan Andris Silva to the entirety of Kalippewatte. The respondent's case is further strengthened by the production of assessment receipts (P6 & P7) in the name of Panis Silva by the fact that in 1903 the 6th defendant-appellant, Telanis' son, acknowledged the title of Panis' children by purchasing William's share on the deed P5 (13th February, 1903)—a deed referring in the attestion clause to another deed in regard to a different land executed on the same way, in the 6th defendant-appellant's house with the privity of all the appellants, and referred back to again in the attestation clause to that deed. As against their strong claim of documentary title, corroborated also by some evidence of posses-

Perera v. Awishamy

sion, the evidence of continuous occupation of the house on the land in dispute by Telanis cannot prevail.

The irregular manner in which the proceedings were conducted in the Court below renders it difficult to do justice to the parties in their case. In defiance of the express provisions of the Civil Procedure Code (secs. 111-114) as to the mode in which documentary evidence is to be proved or admitted and indentified, the Judge merely makes the following journal entry at the close of the respondent's case:—"Documents put in"—without a word to indicate what documents are referred to. In spite of the express condemnation of the practice by the Court in S. C., No. 292, D. C., Kalutara, No. 2,911 (S. C. Mins., 4th June, 1907)[1]—a condemnation en-

[1] SEGO LEBBE *vs.* SULTAN MARIKAR *et al.*

No. 2,911, D. C., GALLE.

Present: WOOD RENTON, J., & GRENIER, A. J.

4th June, 1907.

Elliott for appellant.

Bawa for respondent.

JUDGMENT.

WOOD RENTON, J.—I am clearly of opinion that the decree appealed against in this case cannot stand. The action was one for ejectment and damages against an alleged overholding tenant. I do not find, on the pleadings, any admission of the respondent's title. On the contrary, paragraph 6 of the answer directly challenges it. Under these circumstances it was for the respondent to prove the genuineness of the lease on which he relied; and the further issue could then arise as to whether Avisa Umma, one of the first set of added defendant-appellants, had acquired a title by prescription to the 2/4th shares of the land in question which had belonged to Sultan and Abdul Rahiman. At the trial, however, the appellants began. It does not appear from the record that they objected to the burden of proof being cast upon them. I do not think, therefore, that they can rely upon any such objection now, or that no evidence in favour of the genuineness of the lease was addressed, inasmuch its execution was directly sworn to by the respondent whom they called as their first witness. The duplicate and protocol of the lease were also produced by the clerk of the Land Registrar, to whose custody they had been sent, the former in due course, and the latter after the death of the notary. It is clear, however, from the judgment that the first of the defendant-appellants had impugned the genuineness of the lease at the time when the issue on that point was framed; and strong and practically uncontradicted evidence of prescriptive possession was put forward on their behalf. For the respondent no evidence except that of the clerk of the Land Registrar, to whom I have already referred, was called. The proceedings were closed on 10th October, and an entry was made on the record: "Judgment reserved till 17th instant." The learned District Judge was dissatisfied, however, with the evidence as to the genuineness of the lease, and accordingly, on 31st October, he permitted the respondent to call additional witnesses on this point, in spite of the objection of the appellants' proctor. It would seem indeed (see p. 88 of the record) as if, prior to the 31st October, the Judge had been in communication—no

dorsed by Middleton, J., in 96, C. R., Colombo, No. 3,304, (S. C. Mins., 17th September, 1907)[2]—the learned Judge, after both sides had closed their respective cases, proceeded to give *Perera v. Awishamy*

doubt with both sides—on the subject, for an additional list of witnesses for the respondent was filed on the 22nd. Even if matters had gone no further, it is clear to my mind that the present appeal must have succeeded. A judge has no right in any civil action to say in effect to a plaintiff after the proceedings have been formally closed: "You have not made out your case, but will give you a fresh chance of doing so." The case of *Fernando* v. *Johanis* [(1892) 1 S. C. R. 262) is direct authority on this point; and there is nothing to weaken it in the decision of Bonser, C. J., and Moncreiff, J., in *Hendrick Kure* v. *Saibu Marikar* [(1900) 4 N. L. R. p. 148] in which the right of the Court after judgment reserved to call *ex mero motu* an independent witness to satisfy itself on some incidental point, such as the amount of a valuation, was properly asserted. But in the present case a still further touch of grotesqueness was imported to the proceedings if the uncontradicted allegations in the petition of appeal may be relied upon. It is stated that after the respondent closed his case for the second time the appellants' proctor pointed out to the Court that no proof had been given of the lessee's signature, and that the learned Judge then allowed a witness—whose name by the way does not appear in the respondent's additional list—to be examined or the subject. It is impossible that the judgment in his favour which, after this gradual elaboration of his case in the hands of the Court the respondent obtained, can stand. I attach no importance under the circumstances to that fact that Sultan Marikar did not come forward in these irregular proceedings to deny on oath the genuineness of the lease. Regard being had to the original view taken by the Court of the respondent's case, the appellants were entitled to immediate judgment. I do not think that a new trial should be ordered. The action was instituted so far back as 30th March, 1900. It was abated for want of any further steps being taken on the 2nd November, 1901, but was restored in 1904, and it was only in 1906, on a notice issued at the appellants' instance calling on the respondent to appear and state whether he proposed to go on with the case, that it ultimately came before the District Court. I would set aside the decree appealed against and declare that the appellants have obtained a title by prescription to 2/4 shares of the property in question which they claim. The appellants must have all costs here and below. I desire to call the attention of the learned Judge to the fact that he has made no formal entry as to his ruling on the objection of the appellants' proctor to the admission of further evidence on 31st March, 1906. It is obviously desirable that entries of such rulings should in every case be made. The judgment and decree appealed against is set aside as regards the 2/4 claimed by the appellants. The respondent's right to the other 1/4 stands. The respondent must pay all the appellants' costs here and below.

GRENIER, A. J.—I entirely agree.

---

[2] FERNANDO *vs.* PERERA *et al.*

NO. 3,304, C. R., COLOMBO.

Present: MIDDLETON, J.

17*th September*, 1907.

Bawa (with *E. W. Perera*) for defendant-appellants.

B. F. de Silva for plaintiff-respondent.

JUDGMENT.

MIDDLETON, J.—This was an action to establish a cart-way over

Perera v. Awishamy

the appellant's proctor an opportunity of explaining the deed of transfer (P5), dated 13th February, 1903, of William's share by John Wickramaratne to the 6th defendant-appellant, and, if necessary, "of examining the vendee". He further called for his own information for one deed recited in P5, another recited in P1, and permitted the respondent's proctor to file an additional list of documents, containing the deeds P8, P9 and P10, to which he refers in his judgmet. So far as I can make out from the record, both P5 and the assessment receipts (P6 & P7) were put in *en bloc* at the close of the respondent's case. Speaking for myself, I desire to say that proceedings of this description are worse than irregular. They are positively unjust to both sides. They directly tend to encourage appeals from the learned judge's decisions, and makes the task of the Appeal Court, in endeavouring to arrive at a sound conclusion, needlessly laborious.

In the present case, however, I am with some hesitation of opinion that the appeal should be dismissed. If the evidence on which the learned District Judge relied, and which I have already summarised, may fairly be taken account of, it is undoubtedly sufficient to support his decision. I think that the appellants were not taken unaware by, and that they

---

the defendants' land, and seeking to obtain the removal of certain cocoanut trees so planted by the side of the road or cart-way that in growing they will inevitably obstruct the plaintiff's right of passage.

The Commissioner of Requests gave judgment for the plaintiff; and, notwithstanding the unsatisfactory character of the plaintiff's previous evidence about the road, I am inclined to think that if the documentary evidence subsequently admitted on which the plaintiff relied had been properly proved before the Court, the Commissioner of Requests might have been right in deciding in the plaintiff's favour. Without that evidence properly proved the plaintiff's case is a weak one. The first objection taken was that this was a *quia timet* action which plaintiff ought not to be permitted to maintain.

To this I am not prepared to accede.

The defendant has dug holes to plant his trees, and these holes apparently already improperly narrow the cart-road claimed by the plaintiff, and the result must be that in the ordinary course of nature the trees in growing will increase in girth and size and have a further tendency to obstruct the road.

I think there is sufficient evidence here of a present interference with the plaintiff's rights, if such exist, to enable him to maintain this action.

The plaintiff's rights, if they exist at all, existed at the time of the planting, and the defendant has done an act which is the commencement of an inevitable interference with them in the ordinary course of nature by planting the trees in question.

It is objected also that the plaintiff has been dilatory in bringing this action and that there was no use since 1901 by the plaintiff.

must be held to have acquiesced in the admission even of the evidence which was legally exceptionable. The respondent in his evidence (Record p. 25) distinctly called their attention to the fact that efforts had been made to get the assessment receipts. His witnesses, John William Perera (Record p. 38) and Hendrik Perera (Record p. 39), alleged in terms that receipts had been given to Panis. The 5th defendant-appellant traversed this allegation stating (Record pp. 53 & 55) that Telenis paid the rates, and that she herself held all the assessment receipts—none of which however she produced. No objection appears to have been taken by the respondent's proctor either to the admission of these receipts or to the sufficiency of their identification with the land and with Panis. The additional list of documents filed by the respondent's proctor, after the close of the case was duly notified to, and bears the signature of the proctor for the appellants, who himself took advantage of the re-opening of the proceeding by the learned District Judge to file the plaint in the partition case D. C., Kalutara, No. 3,519 —(which Mr. Bawa made a faint attempt on the argument of the appeal to induce us to regard as laying the foundation for a plea of *res judicata* against the respondent), and ap-

Perera v. Awishamy

This no doubt is to a general extent true, but it is not sufficient to establish the loss of the servitude by non-user if it once existed.

The proceedings of the Commissioner after he had reserved jugdment in allowing further documentary evidence to go before him without proper proof of it cannot be supported under sec. 134 of the Civil Procedure Code; and the facts appear to be almost on all forms with the action of the District Judge in 292, D. C., Kalutara, No. 9,211 (S. C. Min., June 4, 1907) where the judgment was set aside on the ground that the respondents had been allowed by the Judge to elaborate their case after they had in fact closed it, and no new trial was allowed, but judgment given for the appellants.

Here the surveys attached to the deed P6 were not properly proved, nor was it proved that the deed P6 referred to the defendants' land, nor do I think it can be absolutely inferred that defendants' advocate admitted that it did.

In my opinion such proceedings are, as the present ought to be, discouraged by making those responsible for them suffer in costs. This may induce parties to see that their cases are properly proved at the proper time, and that the judge is not importuned to allow supplementary proof after their case is closed, which in my opinion he ought to be strong enough to refuse unless it may be to inform himself of some matter of value or of similar character as was allowed in *Hendrick Kure* v. *Saibu Marikar* (4 N. L. R. p. 148).

On the whole I shall not dismiss the plaintiff's action altogether, but order that a new trial do take place and that the plaintiff do pay the defendant's costs of the old trial and of this appeal. These costs to be paid before the new trial is allowed.

Perera v. James parently addressed the Court again before judgment was delivered.

On the grounds I have indicated I would dismiss the appeal with costs.

PERERA *vs.* JAMES.

NO. 1,550, D. C., RATNAPURA.

Present: HUTCHINSON, C. J., & WENDT, J.

26th November, 1908.

Summons, service of—Translation of summons in defendant's language—Application to set aside decree—Order to pay into Court amount of claim before being allowed to defend—Civil Procedure Code, secs. 55, 86, 87, 704, 707 & 710.

If a defendant, after the decree was made in his absence, applies for an order to set it aside on the ground that no translation in his language of the summons was served on him, generally the decree ought to be set aside.

Where it is not shewn that the defendant did not understand what the claim against him was, or who the plaintiff was, and and that he was prejudiced by the irregularity in the service of summons, the Court has full power under sec. 707 of the Civil Procedure Code to impose the condition that the defendant should pay into Court or give security to the amount of the claim before being allowed to defend the action.

Bawa (with him *Wadsworth*) for appellant.

Samarawickreme for respondent.

JUDGMENT.

HUTCHINSON, C. J.—The plaintiff sued on the promissory note made by the defendant adopting the summary procedure under chap. liii. The defendant did not appear, and the decree was entered for the plaintiff on the 8th July, 1908. On 3rd August the defendant applied to have the decree set aside, and that he might be allowed to answer and defend. In his affadavit in support of the application he says that when the summons was served on him he did not answer because he believed that the note sued upon was made in

Perera v. James

favour of Mustafa Lebbe by him and the plaintiff jointly, and that he had no reason to believe that the note was made in favour of the plaintiff. He did not state that he did not know who the plaintiff was, and he did not suggest that he did not know what he was being sued for. At the hearing before the District Court his proctor raised a new point in argument, viz., that the summons had not been duly served because there was no translation of it in the defendant's language—Sinhalese—as required by sec. 55; and the plaintiff's counsel admitted that no translations were served. The District Judge said he was quite satisfied that the defendant knew who was suing and who was being sued; but he set aside the decree and gave leave to the defendant to appear and defend on condition of his giving security for the amount of the plaintiff's claim. He said nothing as to whether he thought that the defence set up in the defendant's affidavit was sustainable or was made in good faith or not. It is very desirable to insist on the provisions of sec. 55 as to the service of a translation of the summons in the defendant's language being complied with; and if the defendant after the decree was made in his absence applied for an order to set it aside on the ground that no translation was served on him, generally I should say that the decree ought to be set aside; and in such a case if the procedure was under chap. liii., the Court would then consider under sec. 704 whether or not the defendant should be required to pay into Court or give security for the amount of the claim as a condition of being allowed to defend. But in the present case that was not the ground on which the defendant applied to have the decree set aside, and he did not swear that he did not understand what the claim against him was, or who the plaintiff was; and it is not shewn that he was prejudiced by the irregularity in the service of summons. In such a case I think the Court had full power under sec. 707 to impose the terms which it has imposed as a condition of the defendant being allowed to appear and defend, and I do not think the condition imposed was unreasonable. I should therefore dismiss the appeal with costs.

WENDT, J.—I am of the same opinion. During the argument the question occurred to me whether the non-

Pereia v. James service or irregular service of the summons was a "special circumstance" under sec. 707, or whether in view of the provisions of sec. 710 we ought not to invoke the provisions of secs. 86 and 87. I do not however think it necessary to decide that point. The consideration which my lord has pointed out justified the District Judge in deciding as he did in exercising the discretion vested in him under sec. 707.

DUREYA *et al.* *vs.* SIRIPINA.

No. 18,805, D. C., Kandy.

Present: Wendt, J., & Grenier, A. J.

29th September, 1908.

Issue—Objection to framing—Right of Court to frame issue not pleaded in answer—Appeal.

Where an objection was taken to the framing of an issue on the ground that it was not pleaded in the answer,—

Held: That the objection was bad.

Also: Where from the statement of counsel the Court is satisfied that a *bona fide* issue exists between the parties, that is ample material for framing the issue.

The answer, if necessary, might be amended so as to bring it into accord with the issues framed.

A party should appeal from the refusal to frame an issue only when such is what may be called a radical issue in the case.

E. W. Jayawardene for appellant.

vanLangenberg (*Bawa* with him) for respondent.

Judgment.

Wendt, J.—This is an appeal against the District Judge's order made at the trial framing an issue which was not raised in the answer. As appears from the petition of appeal, the issue was framed at the suggestion of the defendant's counsel. The learned Acting District Judge has recorded that the plaintiffs' proctor objected to the framing of that issue on the ground that it was not pleaded in the answer. On the face of it that is a bad objection, as is clear upon a perusal of sec. 146 of the Civil Procedure Code. Where from the statement of counsel the Court is satisfied that a *bona fide* issue exists between the parties, that is ample material for framing the issue. As this Court has often pointed out, the answer, if necessary, might be amended so as to bring it into accord with the issues framed. If the party objecting satisfies the Court that the issue takes him by surprise, the Court has the fullest power to prevent any prejudice to his rights by granting him an opportunity of meeting the new points raised. In the present case I think we ought not to interfere with the Dis-

Ukku Menika v. Ratwatte

trict Judge's discretion, and the appeal will be dismissed with costs. The costs in the Court below will remain in the District Judge's discretion. I cannot refrain from adding that in my opinion plaintiff ought not to have appealed against the order in question. No doubt there have been decisions of this Court recognising the right of the party objecting to what I may call a radical issue in the case to appeal against the settling of it; but this was not such an issue: the *onus* upon it lay entirely on defendant, and it would have been open to the appellant to advance his present contention when he appealed against the final judgment if it happened to be adverse to him.

GRENIER, A. J.—I agree.

UKKU MENIKA *vs.* RATWATTE.

NO. 14,388, D. C., KANDY.

Present: WENDT & WOOD RENTON, JJ.

ARGUMENT: *15th September, 1908.*

JUDGMENT: *26th September, 1908.*

Fiscal's surveyor—Obstruction by third party—Summary powers of the Court—Secs. 286, 325 *&* 377 (*b*), *Civil Procedure Code—Public servant.*

Under sec. 325 of the Civil Procedure Code a judge has the power to bring before the Court by an interlocutory order under sec. 377, (*b*) any person, even though he is not a party to the execution proceedings, who is obstructing the Fiscal's surveyor.

Sec. 286 of the Code gives power to a Court to make an order requiring a person to desist from obstructing or opposing a Fiscal's surveyor.

A Fiscal's surveyor is an officer of the Fiscal within the meaning of sec. 325 of the Civil Procedure Code, as well as a "public servant for the purposes of the Penal Code".

vanLangenberg for appellant.

Bawa for substituted plaintiff-respondent.

c. a. v.

JUDGMENT.

WOOD RENTON, J.—On 26th March, 1901, Arnolis Fernando obtained judgment on a mortgage bond in District

Court, Kandy, No. 14 388, against Wilfred Abeyaratne Ratwatte for the sum of Rs. 3847·32 with interest and costs. The decree ordered, in default of payment, the sale of the mortgaged property including the debtor's interest in "the house situate below the Trincomalie Street, in Kandy, bearing assessment No. 197". The judgment debt was not paid, and the first issue of a writ of execution against the debtor's property seems to have been unproductive. On 22nd July, 1905, the writ was re-issued, and a sale of certain property by the Fiscal realized a sum of Rs. 23. On 14th August, 1906, the present respondent, as executrix of Arnolis Fernando, was substituted as plaintiff on the record. Writ of execution for the entire balance of the judgment debt remaining unpaid was re-issued on 22nd November, 1906, and property, including "the house and premises No. 197, bearing present assessment No. 196, situate at Trincomalie Street in the town of Kandy", was sold. The sale of the above property was duly confirmed, and the Fiscal was ordered to prepare a deed of transfer in favour of the substituted plaintiff-respondent. In attempting to survey the premises abovementioned—which were described in the order confirming the sale as "No. 197, bearing present assessment No. 196"—for the purposes of preparing the diagram or map required by sec. 286 of the Civil Procedure Code, to be attached to Fiscal's conveyance, the Fiscal's surveyor was obstructed by the appellant, who alleged that the premises in question belonged to him and that they had been wrongly sold under the writ. The decree he said in effect authorised the sale of house No. 197. The Fiscal has sold house No. 196. On the motion of the substituted plaintiff-respondent in the District Court notice was issued to the appellant to appear and show cause why the surveyor should not be authorised to make the survey without further obstruction. On the return to the notice the learned District Judge, after hearing parties' proctors, made an order requiring the appellant to desist from obstructing or opposing the Fiscal's surveyor. Against that order the present appeal is brought. I think that the learned District Judge was right. There is no direct authority upon the point. The case of *Deputy Fiscal of Kalutara* v. *Babahamy* [(1902) 3 Br. 90] is referred to in the petition of appeal. But Mr. vanLangenberg, if my

Ukku Menika v. Ratwatte

memory and notes of the argument are correct, did not cite it here on appeal; and in any event it has in my opinion no real bearing on the issue before us. It was a prosecution under sec. 183 of the Penal Code. The surveyor was resisted in attempting to enter on land which the Deputy Fiscal had ordered him to survey. But no proof was offered that the Fiscal's orders were lawful, no copy of the writ was produced; and Middleton, J., held accordingly that no offence under sec. 183 had been committed. In the present case it is not suggested that the order confirming the sale does not refer to the very premises of which the survey has been attempted. The point made by the appellant is that the premises named in that order are not those authorised to be sold uuder the decree. But, as the learned District Jude rightly says, that issue can be tried hereafter. Its existence does not justify the appellant in obstructing the Fiscal in carrying out, through his surveyor, the duty of making a survey which is, in express terms, imposed upon him by sec. 286 of the Civil Procedure Code. In my opinion the order appealed against can be supported under that section itself. It provides that the surveyor charged with the duty of making the statutory survey "shall be an officer of the Fiscal within the meaning of sec. 325", as well as a "public servant for the purpose of the Penal Code". The latter portion of this provision clearly makes obstruction offered to the Fiscal's surveyor a criminal offence. I think that the reference to sec. 325 of the Civil Procedure Code in the former portion of it enables the Court to apply the provisions of sec. 325 by analogy to bring before it by an interlocutory order under sec. 377(b) any person, even although he is not a party to the execution proceedings, who is obstructing the Fiscal's surveyor, and to deal with him, as the learned District Judge has dealt with the appellant in the present case.

I would dismiss the appeal with costs.

WENDT, J.—I am of the same opinion. The order made in no way prejudices the appellant, while it enables the Fiscal to carry out the mandate of the Court.

IN THE MATTER OF THE INSOLVENCY OF GAFFOOR.

NO. 1,548, D. C. (Inty.), KANDY.

Present: WENDT, J., & GRENIER, A. J.

ARGUMENT: *25th September, 1908.*

JUDGMENT: *29th September, 1908.*

Insolvency—Proceedings when adjudication is disputed by insolvent—Where petition of petitioning-creditor mentions no act of insolvency—Consequent dismissal of petition—Affidavit supporting petition.

When an *ex parte* adjudication has been obtained after compliance with the legal requisites, and the alleged bankrupt disputes the adjudication, the petitioning creditor must begin and prove the legal requisites to a valid adjudication or such of them as were disputed, notwithstanding that the insolvent is required to "show cause" against his adjudication. When the creditor has closed his case the bankrupt's witnesses would be heard. The Court has, however, the discretion of allowing the petitioning creditor to adduce further evidence at any stage of the proceedings, if further evidence is deemed necessary.

Where, however, the petition of adjudication does not even state a sufficient act of bankruptcy, a Court is not wrong in dismissing the petition.

The affidavit supporting a petition of adjudication should categorically repeat the material allegations of the petition, and not merely depose in general terms to the contents of the petition being true, although that is the form recognized by the Ordinance itself.

H. J. C. Pereira for petitioning creditor-appellant.

vanLangenberg for alleged insolvent-respondent.

c. a. v.

JUDGMENT.

WENDT, J.—This is an appeal against the order of the learned Acting District Judge annulling the adjudication of the respondent as an insolvent. The adjudication was obtained *ex parte* on the appellant's petition, and a duplicate of the order was as usual directed to be served on the alleged insolvent with the view to his showing cause. On the day fixed for that purpose his proctor submitted that the materials before the Court were insufficient to support any adjudication. The appellant was cross-examined and re-examined upon his petition, and his counsel thereupon moved for leave to supply

In the matter of the Insolvency of Gaffoor

the defects pointed out by the other side. This the Court refused, and dismissed the petition with costs. The proper form of order would have been to annul the adjudication. The learned Judge recorded his opinion that no act of bankruptcy was disclosed in the petition, and it was hardly contested that he was right. Appellant, however, contended that he should have been given leave to enter upon proof by his witnesses *de novo*, and the case of *Re Clay* (1851), 1 Fonblanque's Bankruptcy Cases 212, was referred to. It was there ruled—and the ruling ought generally to be adopted in Ceylon—that when the alleged bankrupt appeared to dispute the adjudication, the petitioning-creditor must begin and prove the legal requisites to a valid adjudication, or such of them as were disputed, notwithstanding that by sec. 104 of the Bankruptcy Act of 1849 (corresponding to our sec. 30) the alleged insolvent was required to "show cause" against his adjudication. When the creditor had closed his case the bankrupt's witnesses would be heard, and the Court reserved to itself the discretion of allowing the petitioning-creditor to adduce further evidence at any subsequent stage of the proceedings, if further evidence was deemed necessary.

That would be the procedure where the *ex parte* adjudication had been obtained after compliance with the legal requisites. Where, however, as in this instance, the petition did not even state a sufficient act of bankruptcy, I cannot hold that the Court was wrong in dismissing the petition. Certainly, I should say the Court had a discretion to permit the defects to be cured, but considering the slipshod and unskilful way in which the appellant's papers were drawn up, the Court was fully justified in refusing to exercise that discretion in appellant's favour.

I agree with the District Judge as to the desirability that the affidavit supporting a petition for adjudication should categorically repeat the material allegations of the petition—as is done in practice in the ordinary civil side of the Court—and not merely depose in general terms to the contents of the petition being true, although that is the form recognized by the Ordinance itself.

I think the appeal should be dismissed with costs.

GRENIER, A. J.—I agree.

JALALDEEN *vs.* THE COLOMBO MUNICIPAL COUNCIL.

(Leave to Appeal.)

No. 9,088, C. R., Colombo.

Present: Wood Renton, J.

Argument: *25th September, 1908.*

Judgment: *29th September, 1908.*

Assessment—Proceedings for reduction—Court of Requests—Leave to appeal—Ordinance No. 7 *of* 1887, *sec.* 7—*Ordinance No.* 5 *of* 1867, *sec.* 5—*Civil Procedure Code, secs.* 5 *&* 6—*Courts of Requests Ordinance (No.* 12 *of* 1895), *sec.* 13(1).

Proceedings to have an assessment reduced are an action within the meaning of sec. 5 of the Civil Procedure Code, and the right of appeal given in such cases by sec. 141 of Ordinance No. 7 of 1887, and sec. 1 of Ordinance No. 5 of 1867, has been impliedly repealed by sec. 13(1) of Ordinance No. 12 of 1895.

The Supreme Court should not allow itself to be carried away by any consideration of public policy, and should not relax the salutary provisions of sec. 13 of the Courts of Requests Ordinance in all cases of assessment.

It is essential that full effect should be given both to the spirit and letter of sec. 13 of the Ordinance, and leave to appeal should be refused, unless it appears on the face of the record itself that there is ground for anticipating that the appeal would be successful.

This was a proceeding against the Colombo Municipal Council for the reduction of an assessment, and the Commissioner of Requests (M. S. Pinto, Esq.) decided in favour of the plaintiff. The Commissioner refused leave to appeal on the facts, and the defendant Council applied to the Supreme Court for such leave.

F. J. de Saram for applicant:—The decision in the case of *Bell* v. *The Municipal Council* (4 A. C. R. p. 27), which the learned Commissioner follows, is wrong in principle. The proceedings for the revision of an assessment constitute a summary enquiry by the Court (sec. 141 of the Ordinance No. 7 of 1887, and sec. 1 of the Ordinance No. 5 of 1867), and not an action under the Ordinances No. 2 of 1889 and No. 12 of 1895.

Jalaldeen v. The Colombo Municipal Council

The right of appeal to the Supreme Court from the findings at the inquiry is expressly given, and has not been repealed, and the order refusing leave to appeal on questions of fact on the footing that this is an action is wrong. If this be an action, the question touches the expenditure of public funds, and rules regarding leave to appeal should be less strictly applied.

c. a. v.

JUDGMENT.

WOOD RENTON, J.—In this case the Municipal Council of Colombo apply for leave to appeal against the decision of the Commissioner of Requests, upholding an objection on the part of a ratepayer praying for a reduction of the assessment by the Council of the premises No. 21, Dam Street, from Rs. 10,056 to Rs. 900.

It was stated by Mr. F. J. de Saram, who appeared for the applicant, that the case was a test one, and that the fate of some fifteen similar applications depended on its result. I have, therefore, considered the arguments which he urged before me as carefully as I can, and I shall now deal with them in detail.

Mr. de Saram supported his application substantially on two grounds. He contended, in the first place, and the learned Commissioner of Requests would have been prepared if the matter had been *res integra* to adopt his contention, that there was, in such cases as the present, an appeal as of right in virtue of the combined provisions of sec. 141 of the Municipal Councils Ordinance 1887, and sec. 1 of the Ordinance No. 5 of 1867; and in the second place that, even if there was no appeal as of right, the case was one in which the learned Commissioner of Requests should have granted leave to appeal, as he has undoubtedly the power to do, under sec. 13(1) of the Courts of Requests Ordinance (No. 12 of 1895) on the facts.

Sec. 141 of the Municipal Councils Ordinance provides that it is lawful for any person who is aggrieved by the assessment or non-assessment or any rateable property to object to an appeal against such assessment or non-assessment in the manner provided by Ordinance No. 5 of 1867. Sec. 1 of

Jalaldeen v. The Colombo Municipal Council

the latter Ordinance gives jurisdiction in such cases to the Court of Requests where the amount of the rate on the annual value of the rated property does not exceed £10 (*i.e.* Rs. 100), and it expressly provides that the decision of the Court of Requests in regard to any objection brought before it under sec. 1 shall be subject to appeal to the Supreme Court. In the present case the rate on the assessed property is less than Rs. 100, and it falls therefore within the jurisdiction of the Court of Requests.

I have, therefore, to consider whether the right of appeal conferred by the section whose provisions I have summarised is still in force.

It is clear that these provisions remain unaffected by any express repeal either in the Civil Procedure Code or in the Courts of Requests Ordinance; but the question before me is, whether they have not been repealed by implication in so far as the right to appeal to the Supreme Court is concerned.

Sec. 13(1) of the Courts of Requests Ordinance provides that there shall be no appeal from any final judgment or any order having the effect of a final judgment pronounced by the Commissioner of any Court of Requests in any action for debt, damage, or "demand", unless upon a matter of law, or with leave of the Commissioner, or of the Supreme Court, a contingency which is provided for in sub-sec. 2.

The very point that I have now to decide was considered by Lawrie, J., in the case of *Bell* v. *The Colombo Municipal Council* [(1901) 4 Appeal Court Reports, p. 27]. In that case it was held by Lawrie, J., that the proceeding to have an assessment reduced is an action within the meaning of sec. 5 of the Civil Procedure Code, inasmuch as it is a proceeding for the prevention or redress of a wrong, and that, therefore, the right of appeal conferred by sec. 141 of the Municipal Councils Ordinance of 1887, in conjunction with sec. 1 of the Ordinance No. 5 of 1867, had been impliedly taken away.

I think that this decision is sound. Even if such a proceeding as we have here did not fall within the range of sec. 5 of the Civil Procedure Code, which I think it does, it would come under the definition of an action in sec. 6, as including "every application to a Court for relief or remedy obtainable

Jalaldeen v. The Colombo Munici-pal Council

through the exercise of the Court's power or authority". I see no reason furthermore for putting any restriction on the scope of the word "demand" in sec. 13(1) of the Courts of Requests Ordinance. It is not now a term of art either under our local law or under modern English procedure. It was a term of art in the time of Coke, and he uses it as being the most comprehensive word under which any form of claim could be put forward (Co. Litt. 291 *b*).

For these reasons I think that Mr. de Saram's application must fail on the point of law which he has taken. I proceed now to say a few words in regard to the facts.

It was contended by Mr. de Saram in this part of his argument that questions of assessment raise issues of public policy, and that the Supreme Court should, for that reason, be prepared to accord to applications for leave to appeal in cases where either an aggrieved ratepayer or an aggrieved assessing local authority was concerned a more favourable consideration than would be meted out to an ordinary litigant in granting leave to impeach the decision of a Court of first instance on mere issues of fact. I am unable to accept this view. It was said by an old English judge so far back as 1831 (see *Richardson* v. *Mellish*, 2 Bingham p. 229) that "public policy is a very unruly horse, and that when once you get astride of it you never know where it will carry you". I am quite clear that the Supreme Court should not allow itself to be carried away by any considerations of public policy, whose unruly propensities have been so quaintly defined by Burrough, J., in the case which I have cited, to the length of relaxing the salutary provisions of sec. 13 of the Courts of Requests Ordinance in all cases of assessment.

I do not see that such cases, where they turn solely on questions of fact, present issues of any more difficult a character than those which come before us on applications for leave to appeal every day. I think it is essential that we should give full effect both to the letter and to the spirit of sec. 13 of the Ordinance, and refuse leave to appeal unless it appears on the face of the record itself that there is good ground for anticipating that the appeal would be successful. I see no such grounds in the present case.

It is obvious indeed that there are arguments which can be pressed against the decision of the learned Commissioner; but it is clear that the learned Commissioner has carefully weighed the whole facts and every contention that was put before him in argument. He has, in one instance at least, verified his conclusion on the fact by personal inspection of the premises.

I refuse leave to appeal, and I do so with all the greater confidence because there is already an appeal in this very case on a question of law which will afford the applicants full redress if the Commissioner's view of the facts has been in any way affected by an inaccurate interpretation of the legal principle of assessment.

KULATUNGAM *vs.* SAPAPATHIPILLAI *et al.*

No. 2,956, D. C., Batticaloa.

Present: Wendt, J., & Grenier, A. J.

Argument: *1st & 2nd October, 1908.*

Judgment: *6th October, 1908.*

*Fire—Destruction of house hired—*Onus *of proving unavoidable accident.*

In an action against a tenant for destruction of a house hired by fire,—

Held: That the *onus* of proving that the destruction was occasioned by unavoidable accident lay on the defendant.

Grenier, J.:—The question of *onus* is one which should be determined, not by any hard or fast rule, but according to the circumstances of each particular case.

Bawa for plaintiff-appellant.

vanLangenberg (*Balasingham* with him) for respondents.

c. a. v.

Judgment.

Wendt, J.—The plaintiff seeks to recover damages for the destruction of his house by fire while in the occupation of

Kulatungam v. Sapapathipillai

the defendants, his tenants. There was no direct evidence as to the origin of the fire. "What appears to be the truth," says the District Judge, "is that a little girl (how little I cannot say, as the child has not been produced), a sister of the 1st defendant, was carrying some fire about for some reason or other, and the wind blew a spark on to the roof or the fence near the roof and set fire to it."

The issues framed were as follows :—

1. Whether the 2nd defendant acted carelessly and negligently and without taking due and proper care and precaution as to let the fire of the kitchen burn down the house?

2. What are the damages ?

The plaintiff began in the Court below ; but it was argued before us that the *onus* of exculpating themselves by showing that the fire was due to unvoidable accident lay upon the defendants. The question of *onus* was an important one, because I think it is clear from the learned District Judge's judgment that if in his view the burden of proof had lain upon defendant's shoulders he would not have found in their favour as he has done. See in particular the passages beginning : "If it had been shown that the fire was caused by neglect," "There is nothing to shew 2nd defendant was aware." The incidence of the *onus* in a case of destruction by fire appears to have been the subject of controversy among the old jurists. Grotius (Introduction Bk. 3. Ch. 19. sec. 11, Maasdorp 395) citing the Digest (Bk. 19. 2. 9. 3) lays the burden on the lessee to prove unavoidable accident. In the analogous case of the contract of pledge the same learned author says that the loss of the pledge by fire or robbery is considered as due to negligence unless the defendant proves the contrary (Bk. 3. 8. 4, and compare Vander Keessel, Thesis 540). Voet (Bk. 9. 2. 20, Sampson p. 325) takes the opposite view on the ground that the *onus* lies by the general rule on the plaintiff, and that negligence, like fraud, will not be presumed. His reasoning is not without force ; but in the conflict of authority I am disposed to follow the ruling of Withers, J., who in the case of *Bastian Pillay* v. *Gabriel* [(1892) 1 S. C. R. p. 264] held that the *onus* lay upon the defendant to prove that the destruction of the property hired by him was occasioned by unvoidable accident.

Kulatungam v. Sapapathipillai

The defendants' evidence is that the 1st defendant (the husband) was out of the house at the time of the fire, and that the 2nd defendant (his wife) was lying down ill after her recent confinement. The little girl mentioned by the District Judge was one of two sisters of the 1st defendant, who were apparently regular inmates of his house. 1st defendant was said to have stated in the presence of the Vidane that his sister was cooking in a shed, and the fire spread from the hearth to the roof. The 2nd defendant is said to have stated that the children had taken fire from the fire-place in the shed, and they had accidentally fired the shed. The 1st defendant denied that his sisters cooked at all: the servants did it for them, and no cooking was done in the shed, but in the kitchen. The 2nd defendant was not called as a witness.

Upon the evidence I am of opinion that the defendants have not exculpated themselves by proving that the fire was due to unavoidable accident. The decree appealed from must therefore be reversed, and plaintiff will have the costs of appeal and the costs in the Court below. Unless counsel can agree upon the amount of damage so as to avoid further expense, the case must go back for the assessment of damages in the District Court.

Upon delivery of the judgment counsel agreed to Rs. 200, and plaintiff will have judgment accordingly with costs in both Courts.

GRENIER, J.—I was inclined to think at the argument of this appeal that the *onus* lay on the plaintiff, as he had distinctly averred that: "The 2nd defendant acted so carelessly and negligently and without taking due and proper care and precaution that the fire in a kitchen put up by the defendants without the authority of the plaintiff caught the roof thereof, burnt and destroyed and otherwise damaged the whole dwelling house." The plaintiff apparently took the *onus* on himself, but it was clearly impossible for him in the circumstances to prove how the fire originated. All he knew was that there was a fire which destroyed that roof of his building which he had hired to the defendant. Mr. Bawa, for the appellant, relied upon an admission made by the 1st defendant to the plaintiff in the presence of the Vidane, that

Kulatungam v. Sapapathipillai

his sister was cooking in a shed which the defendants had constructed near the house attached to the verandah, and the fire had spread from the hearth to the roof. As the 1st defendant was admittedly not in the house at the time the fire occurred, he was evidently saying what was told him on his return by the other inmates of the house, presumably his wife and sister. The District Judge has, more as a matter of surmise than as an actual finding on the evidence, stated that he believes the truth to be that a little girl, 1st respondent's sister, was carrying some fire about for some reason or other and the wind blew a spark on to the roof or the fence near the roof and set fire to it. The origin of the fire was necessarily, therefore, unascertainable upon the evidence adduced in the Court below. The fire having, however, occurred, the *onus* was I think on the defendant to account for it, whether it was accidental or the work of an incendiary, if they desired to exculpate themselves. They are bound to take care of the property hired in the same way as the owners would have taken care of it. As I understand the Roman Dutch Law and the authorities cited to us by counsel, and referred to by my brother in his judgment, the question of *onus* is one which should be determined, not by any hard or fast rule, but according to the circumstances of each particular case. This I think is also in accordance with sound reason and common sense. In my opinion the *onus* in this case clearly lay on the defendants to account for the fire and the consequent destruction of plaintiff's property in such a way that no legal liability should attach to them. They have not discharged that *onus*, and I agree to the order proposed by my brother.

CORNELIA *vs.* SAMODIS.

(In Revision.)

No. 22,212, D. C., Matara.

Present: Wood Renton, J.

9th September, 1908.

Maintenance—Warrant—Power of imprisonment—Warrant for more than one month's arrears—Legality—Sec. 9 *of Ordinance No.* 19 *of* 1889.

Under the Maintenance Ordinance a magistrate has power to order imprisonment only in respect of what remains unpaid after the warrant has been executed.

There is nothing in sec. 9 of the Ordinance preventing a magistrate from issuing one warrant for the recovery of more than one month's arrears of maintenance.

The Solicitor-General in support of application.

Judgment.

Wood Renton, J.—In this case the Police Magistrate of Matara has made an order requiring the respondent to give certified bail in the amount of Rs. 200, to pay Rs. 50 arrears of maintenance for ten months, at the rate of Rs. 5 a month, or in default of such agreement within one month to undergo rigorous imprisonment for 15 days for each month.

The Attorney-General contends that this order is bad in law, and asks that the proceedings be quashed in revision on the grounds, first, that it is incompetent for a magistrate under sec. 9 of the Maintenance Ordinance No. 19 of 1889 to pass a sentence of imprisonment except for the amount remaining due after the warrant for the levy has been executed, and, in the second place, that sec. 9 only authorises the issue of a warrant for a single month's arrears of maintenance.

It is quite clear that on the first ground the proceedings must be quashed. It has been held by the High Court in India under the corresponding section (sec. 488, sub-sec. 3) of the Indian Criminal Procedure Code that a magistrate must be satisfied that the execution of the warrant has proved ineffective before he passes sentence of imprisonment (see

Cornelia v. Samodis

Prinsep, Code of Criminal Procedure p. 478). In my opinion, on the construction of sec. 9 of our Ordinance this interpretation of the law is clearly right. It is only in respect of what remains unpaid after the warrant has been executed that the magistrate has any power to order imprisonment. I, therefore, quash the proceedings in revision. But at the same time I think it right to say that I do not agree with the contention of the learned Solicitor-General that there is anything in sec. 9 of the Maintenance Ordinance to prevent a magistrate from issuing one warrant for the recovery of more than one month's arrears of maintenance. Sec. 9 merely provides that when a month's maintenance is in arrears the Court may issue a warrant for its recovery. It does not in terms prohibit the issue of a single warrant for the recovery of more than one month's arrears, and as a matter of convenience I think that it is desireable that there should be power to issue such a warrant. I am struck by the fact that form 3 in the schedule to the Ordinance which sec. 18 directs to be used contemplates in its recital the recovery of maintenance for more than one month; and I find that the view of the law I am now taking is supported by a High Court ruling in India—see 6 Madras High Court Reports Appendix pp. xxii. & xxiii. It is true that a contrary view was taken by Mr. Justice Hill and Mr. Justice Stevens in the case *Bhiku Khan* v. *Zahinan* (1897) Indian Law Reports, 25 Cal. p. 291. I prefer to follow the earlier decision.

GOONEWARDENE *vs.* BABUN.

Goonewardene v. Babun

NO. 25,994, P. C., MATARA.

Present: WOOD RENTON, J.

24th August, 1908.

Charge—Framing—Requisites—Criminal Procedure Code (Ordinance No. 15 *of* 1898), *sec.* 187 (1), *also secs.* 148 (*b*), 187 (3), & 188 (1).

Where an accused person is not brought upon a summons or warrant, it is the duty of a Police Magistrate to frame a charge against the accused in compliance with sec. 187 (1) of the Criminal Procedure Code.

Such a charge must be embodied in writing.

The entry "charge explained from report" is not a sufficient compliance with the provision in that section.

A. St. V. Jayawardene for appellant.

JUDGMENT.

WOOD RENTON, J.—In this case the accused-appellant has been convicted in the Police Court of Matara, under sec. 394 of the Penal Code, of having dishonestly received certain property, and he has been sentenced to one month's rigorous imprisonment. Two points were taken before me in support of the appeal. In the first place, the proceedings were said to be irregular, inasmuch as no charge had been framed against the accused within the meaning of sec. 187 (1) of the Criminal Procedure Code; and in the second place, it was argued that in any event the Court was in error in taking the statement made by the accused as an unqualified admission of guilt under sec. 188 (1). I have come to the conclusion that the first point must prevail. I have not thought it necessary to hear Mr. A. St. V. Jayawardene on the second. It would appear from the record that the case was launched on a written report in terms of sec. 148 (*b*) of the Criminal Procedure Code by the Station House Officer of Demodera. There is nothing to shew under what circumstances the accused appeared before the Court; but I am disposed to think that he must have been brought up by the Station House Officer along with his report; and in any case, there is no evidence that he was so brought under a summons or a war-

Goonewardene v. Babun

rant. It was, therefore, the duty of the Police Magistrate, in compliance with sec. 187 (1) of the Code, to have framed a charge against the accused. It is not expressly provided in the Code that such a charge must be embodied in writing; but I think that that requirement does follow from the provision in sec. 187 (3), that the magistrate shall read the charge to the accused. In the present case the record contains only the following entry: "Charge explained from report", and after that comes the statement which the Court treated as an unqualified admission of guilt. It was held by Browne, A. J., in the case of *Mendis* v. *Fernando* [(1900) 4 N. L. R. p. 104] that an entry of this character was insufficient, and that any irregularity in the proceedings under sec. 187 should be held to be fatal to a conviction. I entirely agree with that decision, and in particular I adopt the view of Mr. Justice Browne, that a charge framed under sec. 187 (1) should be in writing. I think that this results not only from the requirement in sub-sec. 3 that it should be read to the accused, but also from the proviso to sec. 187, which in cases coming under sec. 148 (b) permits a written report to be read to the accused as a "charge", if the offence is not punishable with more than three months' imprisonment or a fine of Rs. 50. The effect of that proviso clearly is to exclude by implication the framing of a charge in the manner which has been adopted in the present case, where the offence alleged is punishable, as offences under sec. 394 of the Penal Code are punishable, with a heavier sentence or fine that which it contemplates.

I set aside the conviction, and send the case back to be proceeded with in due course of law.

Galle Voters' Case

IN THE MATTER OF THE APPLICATION OF CERTAIN RESIDENTS OF WARD No. 5, OF THE MUNICIPALITY OF GALLE, FOR THE INSERTION OF THEIR NAMES IN THE LIST OF VOTERS FOR THE AFORESAID WARD.

(Galle Voters' Case.)

Present: WOOD RENTON, J.

ARGUMENT: *27th October, 1908.*

JUDGMENT: *31st October, 1908.*

Jurisdiction—Supreme Court—Municipal Councils' Ordinance (No. 7 of 1887), secs. 15, 16 & 42—Trienniel list of voters—Application for insertion of names on—Refusal by Chairman—Right to appeal.

The Supreme Court has no jurisdiction to revise the orders of the Chairman of a Municipality made under sec. 42 of the Municipal Councils' Ordinance, No. 7 of 1887.

This was an appeal against the decision of the Chairman of the Municipality of Galle refusing to insert the names of certain residents in Ward No. 5 of the Municipality of Galle in the list of qualified voters for that Ward.

H. H. Bartholomeusz for appellants:—Sec. 42 of the Municipal Councils Ordinance provides for an application to the Chairman for the insertion or erasure of a name from the triennial list of voters "in accordance with the provisions contained in secs. 15 and 16". The latter sections give a right of appeal to the Supreme Court. Secs. 15, 16, and 42 must be read as a whole, and the effect of the reference back to the secs. 15 and 16 in sec. 42 is to create an appellate jurisdiction in the Supreme Court in cases falling under sec. 42. If it is contended for the respondents that sec. 42 gives a right of appeal to the Police Magistrate, it is submitted that in order to find such a right of appeal we must fall back on the provisions of sec. 15 and 16, and those sections have been amended so as to substitute the jurisdiction of the Supreme Court for that of the Police Magistrate. The words "if needs be" in sec. 42 are intended to give a concurrent jurisdiction to the Magistrate when the Chairman is absent or unwilling to act. They cannot be said to refer to an appeal. Sec. 42 by itself

Galle Voters' Case

would be insufficient to create a right of appeal; and consequently without the reference back to secs. 15 and 16 there would be no appeal from an order of the Chairman refusing a voter to the franchise.

W. S. de Saram, C.C., for the Chairman, was not called upon.

c. a. v.

JUDGMENT.

WOOD RENTON, J.—In the present case I am invited on behalf of a number of voters in Ward No. 5 of the Municipality of Galle to revise certain orders by the Chairman made under sec. 42 of the Municipal Councils' Ordinance 1887 (No. 7 of 1887) refusing to insert their names in the triennial list of voters which has been prepared with a view to the ensuing Municipal elections.

At the very threshold of the case I am with faced the question whether under the law, as it now stands, the Supreme Court has any jurisdiction to entertain such an application at all. I am indebted to Mr. Bartholomeusz for having put clearly and forcibly before the Court all that can be urged in favour of an affirmative answer to this question; but I have come to the conclusion that it must be answered in the negative, and I propose to state the grounds of my decision as clearly and as briefly as I can.

Secs. 13 and following of the Municipal Councils' Ordinance provide machinery for the settlement and publication of the lists of persons who are respectively entitled to be elected and vote on the original constitution of a Municipality. As they stood in the unamended Ordinance of 1887, secs. 15 to 18 enable any voter (I am confining myself to the particular class of case now before me) who was dissatisfied with the omission of his name from the original list to apply in writing, within seven days from the date of publication of the notice of its completion, to the Chairman or Government Agent, whoever shall have prepared the list in question, to have his name inserted in such list, and, in the event of his application being refused, he had the right to apply to a Magistrate—a term defined in sec. 3 of the Ordinance as the "Police Magistrate having jurisdiction within the Municipality"

Galle Voters' Case.

—for an order for its insertion. The Ordinance went on to provide for a summary inquiry by the Magistrate into the merits of the application, and empowered him after such inquiry to make such order as to the insertion or omission of the name of the applicant and as to the payment of the costs of the inquiry as he thought just; and it further provided that such order "if it directs the insertion of any name in such list" shall be "forthwith complied with" by the Chairman or the Government Agent, as the case may be.

Sec. 42 of the original Ordinance dealt with a different state of things. It related to the new lists of voters, which, under sec. 41, the Chairman is directed to prepare with a view to the triennial election in the month of September of every third year; and it provided that any person claiming to be qualified to vote, whose name had been omitted from such lists, may, "in accordance with the provisions contained in secs. 15 and 16, apply to the Chairman to insert any such name, and, if need be, to a Magistrate for an order of insertion; and every order, made by such Magistrate on any such application directing the insertion of any name in the said list, shall be forthwith complied with by the Chairman".

It was conceded, if I understood aright, by Mr. Bartholomeusz, in one part of his argument, that the effect of the reference back, in sec. 42, to the provisions of secs. 15 and 16 was to confer on the Magistrate an appellate jurisdiction in regard to the decision of the Chairman under the first of the three sections, which I have just named. He contended, however, that secs. 15, 16, and 42 must be read as a whole. That sec. 42 is the accessory of secs. 15 and 16, and that, but for the existence of the latter sections, and the incorporation of their provisions in sec. 42, there would be no right of appeal under that section from the Chairman to the Police Magistrate. I will take this argument as it stands and proceed to consider its legal effect on the changes which have been made in the Municipal Councils' Ordinance of 1887 by Ordinance No. 1 of 1896. This case has come before me on circuit, and I have unfortunately been unable to obtain access in Tangalle to the Volume of Ordinances for the year 1896, in which Ordinance No. 1 of that year must have been textually published. It is true that the Ordinance has been scheduled, in part of

Galle Voters' Case

that of 1887, at pp. 346 to 354 of the second volume of the revised Edition of the Legislative enactments of the Colony. But in the reprint there given the very sections which are of importance here are not reproduced. At the same time through the whole argument before me this morning it has been assumed that the effect of Ordinance No. 1 of 1896 on the material sections in the Ordinance of 1887 has been correctly set out in the amended text of that Ordinance itself; and as it is necessary that this case should be disposed of today, in view of the provisions of sec. 43, I decide it on that basis.

Prior to the enactment of the Ordinance No. 9 of 1896 I take it that there were two independent rights of appeal created by and existing under the Ordinance of 1887.

In the first place, there was the right of appeal in connection with the omission of names from the list of voters in a newly constituted Municipality. In the second place, there was the right of appeal under sec. 42 as regard the omission of names from the new lists, for whose preparation provision was made under sec. 41. In each of these cases the right of appeal was to the Police Magistrate. But there was a difference between the two sets of provisions in regard to what I may call the Court of first instance. In cases coming under secs. 15 and 16, it was competent for the dissatisfied voter to apply either to the Chairman or the Government Agent, whereas, in cases coming under sec. 42, provision was made for applications for the insertion of names being presented to the Chairman alone. If I had had to construe the provisions of secs. 15 and 16, on the one hand, and sec. 42, on the other, in their original form, I should have been disposed to hold that they create entirely independent rights of appeal, and that express interference of the legislature with one of those rights could have no effect by implication upon the other. It may be true, as Mr. Bartholomeusz argued with so much force, that in order to find the right of appeal to the Magistrate under sec. 42, you have to fall back on the provisions of secs. 15 and 16; although, I am not sure that the language of the last clause in sec. 42 which directs a Chairman, in terms closely following the words used in sec. 17, to comply forthwith with any order for the insertion of a name, which the Police Magistrate may have made, taken in conjunction with

very different language used by the legislature, for example, in the amendment, by sec. 8 of Ordinance No. 26 of 1890 of sec. 130 of the Ordinance of 1887, when it intended to create powers of a concurrent character—would not be sufficient of itself to create an independent right of appeal. But, however that may be, it is clear to my mind that when once a right of appeal under sec. 42 of the Ordinance of 1887 has been constituted, it was a right separate and independent from that created by secs. 15 and 16 although subject to the same conditions as to the time within which it must be exercised, and as to the form of the enquiry in which it was to be adjudicated upon we have to turn now to the provisions of Ordinance No. 1 of 1896, and we find that what the legislature has done in that enactment is to substitute in the case of applications under secs. 15 and 16 of the Municipal Councils' Ordinance an appeal summarily to a judge of the Supreme Court for the former application to a magistrate. The Ordinance of 1896 has, however, left the provisions of sec. 42 severely alone; and as a mere matter of statutory interpretation I am unable to hold that the Supreme Court has any jurisdiction to entertain applications under that section.

Apart from mere considerations of statutory construction, there may be, I think, substantial grounds of policy to which the silence of the legislature in 1896 in regard to cases coming under sec. 42 may be attributed. It may have been thought desirable that when the original list of electors and voters in a new Municipality were being settled there should be a right of appeal to the Supreme Court, which would be quite unnecessary when the limits of the eletorate in the new body once had been fairly established. But whether intentional or inadvertant the fact of the silence of the legislature remains.

I will say one word in conclusion with regard to the alternative ground on which, although somewhat faintly, Mr. Bartholomeusz at the close of his argument rested his case. He said, in effect, that the language of sec. 42 was insufficient to create a right of appeal, and that all that it did, at least in the absence of corroboration from secs. 15 and 16, was to invest the Magistrate with a concurrent jurisdiction if

Galle Voters' Case

the Chairman of the Municipal Council, owing to absence or some other cause, was unable or unwilling to act and that, as it was clearly intended in 1896 to give a right of appeal under sec. 42, the Court should now supply the hiatus. I have already touched incidentally on this branch of Mr. Bartholomeuz's argument in dealing with what is really the substantial case put forward by the applicants; and I will only now add that, if it were sound, it appears to me that there would be no right of appeal under sec. 42 at all. It is clear law that a right of appeal must be created by language which, if not express, is strong enough for the purpose. And if the Chairman and the Magistrate possessed under sec. 42 of Ordinance No. 7 of 1887 only a concurrent jurisdiction, there is in my opinion nothing in secs. 15 and 16 as amended by Ordinance No. 1 of 1896, which could confer the right for which the applicants contend.

As I have already pointed out, under these sections in their original form the dissatisfied voter may apply to the Chairman or appeal to the Magistrate, whose decision (see sec. 18) is final. I confess that I do not see how from the mere reference to secs. 15 and 16, which we find in sec. 42, it would be possible to hold that the right of appeal created by the two former sections in their amended form is carried forward by necessary implication into the latter. We could still find a clear and simple interpretation of the reference in sec. 42 to the provisions of secs. 15 and 16 in the interpretation of the legislature to impose the same condition as to the time within which applications to the Chairman must be made and the form of application itself in the case of both the classes of procedure which the Ordinance prescribes. If there was no appellate jurisdiction under sec. 42 in its original form, assuredly none is created by Ordinance No. 1 of 1896. I have endeavoured to touch upon all the points that were pressed upon me in the course of the argument.

The applications are dismissed, and, I think, they must be dismissed with costs.

LADY DE SOYSA vs. THE MUNICIPAL COUNCIL OF COLOMBO.

Lady de Soysa v. The Colombo Municipal Council

No. 6,899, C. R., Colombo.

Present: Hutchinson, C. J.

Argument: *11th June, 1908.*

Judgment: *23rd June, 1908.*

Assessment—Annual value—Leasse—Vacancy of house—Ordinance No. 7 of 1887.

The annual value is the annual rent which a tenant might be expected to pay for any house taking one year with another if the tenant undertook the repairs.

In this action the plaintiff-respondent sued the appellants for a reduction of the assessment of the premises No. 12, New Moor Street, for the year 1907, from the sum of Rs. 240 to Rs. 207·60, alleging that the latter sum was the fair annual value. The learned Commissioner of Requests (M. S. Pinto, Esq.) after trial delivered the following judgment in favour of the plaintiff :—

"The plaintiff has calculated the annual value of the house on the basis of the rent paid to her by her tenant. The Municipal Council has calculated it on the basis of the rent paid by the sub-tenant to the tenant. From the definition of "annual value" given in the Municipal Councils' Ordinance it is clear that in calculating the annual value the rent paid by a tenant taking one year with another is to be taken into account, that is to say, the rent paid for any particular year, much less for any particular months, should not be taken into account, but the average of the rent ordinary recoverable during a few consecutive years. This provision is no doubt for the purpose of making due allowance for the houses following vacant periodically and for fluctuations of rent.

The Inspector admits that in calculating the annual value of the house he has gone on the footing that the house may never fall vacant, nor has he shewn that he has made enquiries as to the rent paid during past few years.

Lady de Soysa v. The Colombo Munici-pal Council

He has not said, either, that he has found that similar houses in the same locality fetch higher rent than that recovered by the plaintiff for this house. He appears to have based his calculation entirely on the rent paid by the sub-tenant of the adjoining house, and on the fact that the assessment of this house was Rs. 240 so far back as 1899.

On the other hand there is no reason to suppose that the plaintiff would have been satisfied with the rent paid by her tenant if she could obtain higher rent from others.

I give judgment for the plaintiff as claimed with costs."

From this judgment the Municipal Council appealed.

F. J. de Saram, Jr., for appellant.

vanLangenberg for respondent.

c. a. v.

JUDGMENT.

HUTCHINSON, C. J.—The plaintiff is the owner of premises No. 12, New Moor Street, Colombo. The defendants notified her in July, 1907, that they had assessed the premises for the purpose of the police, lighting, and water rate for the year 1907 at the annual value of Rs. 240. She objected to the assessment, and requested the Council to reduce it to Rs. 207·60; but the Council refused to do so. She thereupon brought this action asking the Court to amend the assessment by reducing it to Rs. 207·60.

The only evidence for the plaintiff was that of her bill collector, who deposed that he collected her house rent and that No. 12 and the adjoining house had been given in rent to Martin Perera, that the rent is Rs. 45 per month for both, that the plaintiff pays taxes, and that "we could not get a better rent for the two houses". He said that he did not know to whom the two houses were sub-let, that there was a family iving in No. 12, that No. 13 (the adjoining house) was also sub-let, and that Martin Perera does not live in either No. 12 or No. 13. This being the only evidence, and there being nothing to shew how the rent of Rs. 45 a month is apportioned between the two houses, it seems to me that the Commissioner might have dismissed the action at once.

Lady de Soysa v. The Colombo Municipal Council

He, however, called on the defence, and evidence was given for the defence. The Revenue Officer, whose duty it is to assess new buildings and attend to objections to assessment, said that he enquired into this objection, that he visited No. 12, and saw the tenant (not Martin, but Lamenti Perera) and asked him what rent he paid; that the assessment of Rs. 240 was made in 1899; that in his opinion Rs. 240 represents less than the fair annual value, that Rs. 300 was a fair annual value minus the taxes, and the assessable value would be Rs. 264. He said that No. 12 is very little smaller than No. 13; and if No. 13 pays Rs. 30 a month he would put down the rent of No. 12 at Rs. 25 per month. He also said that in assessing he took it for granted the houses would be occupied during the 12 months. A man who had rented No. 13 from Martin Perera, apparently in 1907, deposed that his rent was Rs. 30 a month.

The Commissioner gave judgment for the plaintiff. He said the Revenue Officer based his conclusion entirely on the rent paid by the sub-tenant of No. 13, and on the fact that the assessment of No. 12 was Rs. 240 in 1899, and that he went on the footing that the house may never fall vacant, whereas from the definition of "annual value" in the Municipal Councils Ordinance it is clear that the rent paid by a tenant taking one year with another is to be taken into account, that is, the average of the rent ordinarily recoverable during a few consecutive years. He said that this provision is no doubt for the purpose for making due allowance for houses falling vacant periodically, and for fluctuations of rent; also that there is no reason to suppose that the plaintiff would have been satisfied with the rent paid her by her tenant if she could obtain higher rent from others.

There is no evidence as to what rent Martin Perera received from his tenant for No. 12, or that No. 12 even was vacant. The only evidence on the latter point is that of the Revenue Officer, who said that in that locality houses are always in demand, that at that end of Moor Street houses do not fall vacant. And, as I have said, there is no evidence what proportion of the rent received by the plaintiff for the two houses is attributed by her to No. 12.

Kira v. Menika

I was referred to a judgment of Grenier, J., in S. C. 383, on an appeal from the C. R., Colombo, on the 4th December, 1904*, in which he had to consider the case of a house in the Pettah, which was leased for Rs. 1,800 for a year, and which the lessee let out to a number of tenants at rents which amounted in the whole to considerably more. He said that if the landlord himself let the premises (*i.e.*, to the sub-tenants) and collected the rents himself he would certainly get more than the amount he now receives; and he thought that the annual value must not always be decided by what a lessee, who is inclined to make a profit out of the transaction, pays, but by the rents and profits which the owner would derive from the premises if he let tenements himself; and he held that the assessment at Rs. 2,430 was in the circumstances a correct one.

The Ordinance defines "annual value" as the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for any house if the tenant undertook the repairs. In my opinion the evidence proves that Rs. 240 is the fair annual value of this house. I allow the appeal, and dismiss the action with costs in both courts.

KIRA *vs.* MENIKA.

NO. 14,677, C. R., KANDY.

Present: WOOD RENTON, J.

11th December, 1908.

Practice—Trial—Where onus *is on defendant—Right to call plaintiff.*

Where the burden of proof is on the defendant, he must make out a *prima facie* case before the plaintiff is called upon to answer it; he has no right to attempt to discharge the burden by a cross-examination of his adversary.

Drieberg (*V. M. Fernando* with him) for appellant.

No appearance for respondent.

JUDGMENT.

WOOD RENTON, J.—In this case I am unable to say that there is not sufficient evidence to support the finding of the learned Commissioner of Requests, and the appeal must be

* Vide 4 A. C. R. p. 26.—EDS.

Kira v. Menika

dismissed with costs. At the same time I desire once more to record my strong opinion against the practice, of which the present case has funished a fresh example, whereby, when the burden of proof has been held to fall on a defendant, the first witness the defendant puts in the box is the plaintiff himself. This practice is entirely contrary to the spirit of the Civil Procedure Code, in which the legitimate course of a trial is prescribed, and it is also most unfair to the plaintiff. If the burden of proof has been decided to fall upon a defendant, the clear and only meaning of the ruling of the Court on that point is that the defendant must make out a *prima facie* case before the plaintiff is called upon to answer it; and the defendant has no right to attempt to discharge the burden which the Court has placed upon him by a cross-examination of his adversary. In a recent appeal from the District Court of Kalutara* Mr. Justice Wendt and I expressed our views on

---

* SILVA *vs.* SILVA.

No. 3641, D. C., Kalutara.

Present: Wendt & Wood Renton, JJ.

Argument: 18*th September*, 1908.

Judgment: 22*nd September*, 1908.

vanLangenberg (with *V. M. Fernando*) for appellant.

B. F. de Silva for respondent.

Judgment.

Wood Renton, J.—I think that the decree appealed against should be set aside and the case sent back for trial before another judge. It is undesirable to discuss the evidence, as there is to be a new trial; and I propose to refer to it only so far as is necessary for the purpose of indicating the grounds of the order which, in my opinion, ought to be made. The respondent sued the appellant, who is his brother, to compel him to re-convey a land called Ambalamalanga deniya. He alleged that he had given the appellant a sum of Rs. 50 to buy the land for him, and that the appellant had fraudulently got the deed of transfer executed in his own name. The deed in question is dated the 26th March, 1900. The appellant denied the respondent's allegations. Issues were framed, and the case came on for hearing in due course. The appellant being in possession of the land in dispute under his deed, the burden of proof was, of course, on the respondent. Following what we were informed at the argument is a general practice in the District Court of Kalutara, he proceeded to discharge that burden by putting the appellant in the box as his first witness; and by examining, or rather cross-examining, him severely with a view to shewing (i) that he had written letters to his brother, the respondent, acknowledging the latter's

Kira v. Menika

this point in the same sense, and I shall close these observations by adding, as my brother Wendt did in the case that I have referred to, that I hope we shall hear no more of this objectionable practice in future.

---

claim to the land in dispute, and (ii) that, in a previous case, he had delivered to his transferee, one Calenis Vederala, letters of his brother with which to meet the latter's claim. The appellant denied both allegations. Thereupon the respondent's proctor called Calenis Vederala, and, although the proctor for the appellant objected to this proceeding on the ground that Calenis' name was not on the list of witnesses, the Judge allowed him to be examined, and he only contradicted the appellant's story. So far not a scrap of affirmative evidence had been adduced by the respondent in support of his case. Having now, however, destroyed the defence by anticipation, and conveyed to the learned Judge a view of the appellant's veracity to which he afterwards gave expression by saying that "under examination he proved a bald and unblushing liar", the respondent's proctor called his client, put in the correspondence, whose genuineness the appellant had denied, and closed his case - securing judgment in his favour a few days later. I think that the whole proceedings in the Court below were irregular, and calculated to prejudice the learned Judge's mind against the appellant's case to a high degree. Although the Civil Procedure Code provides (sec. 175) that "any party to an action may be called as a witness without his name having been included" in the list, and thereby technically, perhaps, recognises the right of a litigant to put his opponent in the box, such a proceeding is contrary to the ordinary "course of trial" which the Code prescribes, and which requires each party (see secs. 151 and 163) to produce "his" evidence, and call "his" witnesses, who are to be liable (secs. 151 and 163) to be cross-examined in the real and proper sense of the term. No departure from this procedure should be sanctioned by the Court except for "grave cause to be recorded at the time" under the provisions of sec. 175 of the Code. Ample statutory machinery has been created for the purpose of securing admission by a defendant either on notice to admit (sec. 101), or on examination on interrogatories (sec. 94), without the dangerous inversion of the normal course of trial, which was permitted in the present case. The record of the evidence and the judgment alike point to the desirability of a new trial. So strongly impressed was the learned Judge with the supposed preliminary exhibition of inveracity by the appellant, that, without, so far as I can see, any "special circumstances rendering the step advisable in the interests of justice" (sec. 175), he allowed the respondent's proctor to contradict him by the evidence of Calenis, whose name was not on the respondent's list of witnesses. Moreover, the judgment itself contains no allusion to points that might fairly be made against the respondent's case, such as the long delay between the date of the alleged fraudulent conveyance (16th March, 1900) and the institution of the action (21st October, 1907) I would set aside the decree under appeal, and send the case back for trial before another judge. The appellant should have his costs of this appeal in any event. All other costs must be costs in the cause.

WENDT, J.—I agree.

I hope we shall hear no more of the practice of a party on whom the *onus* lies and who has given no evidence on his own side to discharge it calling and cross-examining his adversary with the view of discrediting him in advance as to anything he may say when he enters upon his case.

SWARIS *vs.* PIERIS *et al.*

No. 8,608, C. R., Colombo.

Argument: *19th November, 1908.*

Judgment: *7th December, 1908.*

Present: Grenier, A. J.

Action for damages—Liability of heirs of deceased tort feasor.

An action for damages is not maintainable against the wife (as heir in possession of her deceased husband's property) for a tort committed by her husband, and in respect of which no action had been brought against him during his lifetime.

A. St. V. Jayawardene for appellant.

c. a. v.

JUDGMENT.

Grenier, J.—This was an action by the plaintiff against three defendants to recover damages sustained by him by reason of an assault committed on him by the 1st and 2nd defendants and by the husband of the 3rd defendant.

The action is well founded so far as the 1st and 2nd defendants are concerned. They both appear to have acted in concert with the husband of the 3rd defendant and caused grievous hurt to the plaintiff. They were convicted in the District Court of grievous hurt, and, although the fracture of the plaintiff's arm was caused by a blow dealt by the 3rd defendant's husband, all the accused having joined in the assault and having actively aided and abetted each other were equally reponsible for the consequences of it.

The Commisioner was, in my opinion, wrong in dismissing the action against the 1st and 2nd defendants. The plaintiff stated in evidence that he spent about Rs. 160 in the lower court and the District Court, and that he was in hospital for about seven days. There was no cross-examination by the defendant in regard to the actual expenses incurred by the plaintiff, nor, indeed, were any questions put at all to the plaintiff in cross-examination.

Swaris v. Pieris

The plaintiff was, therefore, entitled to claim damages from the 1st and 2nd defendants; and I think that the sum of Rs. 160 represented the damages actually incurred by him.

I am not at all clear, however, that any action lies against the 3rd defendant for a tort committed by her husband, and in respect of which no action had been brought against him during his lifetime. The Commissioner has referred to a passage in Vol. 2, p. 515, of Walter Pereira's work on the Laws of Ceylon, where it is stated, on the authority of Poth. 3. 7. 3. 2., that a claim for the reparation of injuries is extinguished by the death of the creditor or person injured if during his lifetime he had not made any complaint or demand in a court of justice, and that where no such demand had been made the injured party would be deemed to have forgiven and pardoned the injury

The passage cited to me by the appellant's Counsel from Voet 9. 2. 12. seems to contemplate cases where an action had already been instituted by the party injured, but which action had never reached the state of *litis contestatio.* Here we find that the plaintiff brought no action against the 3rd defendant's husband during his lifetime, and I think that the Commissioner was right in holding that the action was not maintainable against the 3rd defendant.

Personally, I am not aware of any similar action having been ever brought against the heirs or persons in possession of the property of a deceased tort feasor, nor has Counsel been able to refer me to any single case in which such an action has been allowed under our present law.

I would allow the dismissal of the action against the 3rd defendant to stand, but would reverse the judgment of the Court below, and give judgment to the plaintiff as against the 1st and 2nd defendants for the sum of Rs. 160 with costs in both courts.

The plaintiff will, however, pay the costs of the 3rd defendant in both courts.

In the matter of the Estate and Effects of Don Emis, deceased

IN THE MATTER OF THE ESTATE AND EFFECTS OF DON EMIS, DECEASED.

No. 396, D. C., Kalutara.

Present: Hutchinson, C. J., & Wood Renton, J.

Argument: *16th December, 1908.*

Judgment: *21st December, 1908.*

Execution sale—Material irregularity—Non-advertisement in the "Gazette"—Substantial injury—Sale at an undervalue—Civil Procedure Code, secs. 256 *&* 282.

The non-advertisement of the execution sale of immoveable property over Rs. 1,000 in value in the *Government Gazette*, as required by sec. 256 of the Civil Procedure Code, is a material irregularity within the meaning of sec. 282.

The sale for Rs. 220 of landed property over Rs. 1,000 in value may fairly be taken to be *prima facie* sufficient proof of substantial injury to satisfy the latter part of sec. 282.

Bawa (with *Akbar*) for appellants.

No appearance for respondent.

C. a. v.

JUDGMENT.

Wood Renton, J.—I do not think that we can interfere in this case. There is sufficient evidence that the immoveable property in question was over Rs. 1,000 in value; and the non-advertisement of the sale in the *Government Gazette*, as required by sec. 256, was, therefore, in view of the decision of Layard, C. J., and Moncreiff, J. (which is binding on us) in *Rosenberg* v. *Silva* [(1904) 8 N.L.R.p. 110], a material irregularity within the meaning of sec. 282 of the Civil Procedure Code. The sale for Rs. 220 of landed property over Rs. 1,000 in value may fairly be taken to be *prima facie* sufficient proof of substantial injury to the respondent to satisfy the latter part of sec. 282 of the Civil Procedure Code. In *Rosenberg* v. *Silva* Layard, C. J., seems to have treated the mere non-advertisement of the date in the *Government Gazette* not only a "material irregularity", but also as a "substantial injury" within the meaning of sec. 282 of the Code, inasmuch as it deprived the execution-creditor of the benefit of the fact

Altygalle v. Wickrematunge

that "intending purchasers would naturally refer to the *Government Gazette*". But in that case the Court had also before it positive evidence that the sale had been effected at an under value, since the execution-creditor was himself willing to pay a larger figure for it than that paid by the purchaser. In the present case it was admitted that the land in question was purchased in 1900 by the judgment-debtor for Rs. 1,500, and was inventoried at the same value; and his administratrix stated that it was now worth a good deal more than at the time of purchase. As against this evidence there were merely the fact that the Fiscal's officer, who was not called as a witness, had valued it at Rs. 400, and the statement by the purchaser that it was worth Rs. 350. I think that is a just inference from the evidence that the sale price in this case is greatly under the real value of the property. The execution-creditor has therefore suffered "substantial injury".

I would dismiss the appeal with costs.

HUTCHINSON, C. J.—I agree.

ATTYGALLE *vs.* WICKREMATUNGE.

NO. 15,193, P. C., KANDY.

Present: WENDT, J.

9th September, 1908.

Hemp—Possession of locally grown hemp—Licensee under Poisons Ordinance—Ordinance No. 17 *of* 1905, *secs.* 3 (2) *&* 3 (1)—*Ordinance No.* 11 *of* 1901, *sec.* 2.

The provisions of sub-sec. 2 of sec. 3 of Ordinance No. 17 of 1905, which prohibit the importation and possession of Indian hemp, do not apply to persons licensed under the Poisons Ordinance (No. 11 of 1901).

Sub-sec. 2 of sec. 3 of the Ordinance of 1905 is applicable to all kinds of hemp, even locally grown hemp.

Bawa for appellant.

The Solicitor-General for respondent.

JUDGMENT.

WENDT, J.—The accused has been convicted of possessing a quantity of Indian hemp, in contravention of sec. 3 (2)

Attygalle v. Wickremaiunge

of Ordinance No. 17 of 1905, as amended by sec. 2 of Ordinance No. 2 of 1907. He is the holder of a license to sell poisons under sec. 3 of the Poisons Ordinance (No. 11 of 1901), and contends that he is, therefore, covered by the exception in the proviso to the aforesaid sec. 3 (2). The Magistrate's view is that the only Indian hemp which such a licensee can lawfully possess is imported Indian hemp; that the *onus* of bringing the hemp in question within that description lies on the accused—the fact being peculiarly within his knowledge—and that as he has not discharged that *onus* he is liable to be convicted. The original sec. 3 of the Ordinance of 1905 forbade any person whatever to (1) grow or (2) import or have Indian hemp. The amended sec. 3 is split into two parts. The first re-enacts the prohibition against any person whatever growing the plant; but the second, in re-enacting the prohibition against importing and having, is subject to the proviso that the provisions of this sub-section shall not apply to any person licensed under the Poisons Ordinance. The present appellant being such a licensed person, it seems to be the clear result of the enactment that he cannot be convicted of a contravention of these provisions which in terms do not apply to him. The Magistrate, however, appears to be of the opinion that sec. 4 of the Ordinance of 1907 is exhaustive of the rights of such licensed person; that it in terms empowers him to possess only imported hemp; and that the exempting proviso in sec. 3 of the older Ordinance must be limited by the terms of this sec. 4. Here I think the Magistrate is clearly wrong. He is influenced by the consideration that to permit a licensed person to deal in locally grown hemp would be to "countenance" the local raising of the plant, which sec. 3 (1) expressly forbids. Sec. 4 no doubt expressly empowers the licenseet o import and sell Indian hemp; but even if the power of sale is merely limited to the imported article, I do not see how that can govern sec. 3 (2) of the Ordinance of 1905. This sub-section is beyond doubt applicable to all kinds of hemp, and from its terms the appellant is excluded. If the legislatûre intended to allow a licensed dealer in poisons to sell only imported hemp, then clearly *quod voluit non dixit.*

I set aside the conviction, and acquitt he appellant.

Carpen Chetty v. Christina Hamy

CARPEN CHETTY *vs.* CHRISTINA HAMY *et al.*

No. 3,261, D. C., KURUNEGALLE.

Present: HUTCHINSON, C. J., & WENDT, J.

ARGUMENT: *23rd November, 1908.*

JUDGMENT: *23rd December, 1908.*

Deed of gift—Action to set aside—Fraud of creditor—Necessary allegations.

In an action to set aside a deed of gift on the ground that it was executed in fraud of creditors it is necessary to allege fraud in the plaint and to prove it.

Such a deed can be set aside at the instance of a creditor only on the ground of fraud.

To establish fraud he must show both *animus fraudandi* and the fact of consequent loss to him.

Walter Pereira, K.C., S.-G. (with *Bawa*) for appellant.

vanLangenberg for respondent.

c. a. v.

JUDGMENT.

HUTCHINGSON, C. J.—This is an appeal by the defendant from the judgment of the District Court dated the 21st January last.

In August, 1904, the plaintiff sued L. Mariano Silva to recover a sum due on an assignment of a lease.

On the 17th April, 1905, Mariano Silva, by deed of that date, gave several lands and buildings to his son, the defendant, subject to the life interest therein of the grantor and of his wife (who is the 1st defendant), and he died the next day.

Afterwards the defendants were substituted for Mariano Silva as defendants in that action on an allegation that Mariano Silva's estate was under Rs. 1,000 in value; and in August, 1906, judgment was given in that action that the defendants should pay to the plaintiff Rs. 1,500 and costs, which judgment was affirmed on appeal in December, 1906, with the important amendment, to which the plaintiff's counsel agreed, that the decree should be limited to the assets

Carpen Chetty v. Christina Hamy

of the deceased which have come to the hands of the defendants.

The plaintiff in execution of his judgment seized certain land, which the defendants claimed under the deed of 17th August, 1905, and their claim was upheld. The plaintiff then brought this action, in which he said that the deed of gift was executed during the pendency of his action against the grantor; that the lands are in the defendants' possession by virtue of the gift; and that by reason of the gift the plaintiff is prevented from recovering the amount of his judgment debt as there are no available assets left by Mariano Silva, and he claimed a declaration that the said lands are liable to be sold in execution of the said judgment.

The defendants in their answer said that the plaint disclosed no cause of action, since it is not alleged that Mariano Silva executed the deed of 17th April, 1905, dishonestly, or with intent to defraud the plaintiff, or to prevent the realisation of the plaintiff's claim against him. And the only issue with which we are now concerned is, whether the plaint is defective as the answer alleges.

It is admitted that Mariano Silva did not leave sufficient property to satisfy the defendant's debt; also that he was a very old man when he executed the deed of gift to his son; and that he was a low-country man, married in community of property to the 1st defendant.

The plaintiff adduced no evidence, and on the facts as above stated the District Judge gave judgment in his favour. He said that it was not necessary to allege fraud, that, "whether Mariano Silva intended to defraud his creditors or not the fact remains that if the deed of gift is upheld as against them, they will be defrauded......... It may be that the donor had no intention whatever of defrauding his creditors; he was very ill at the time; he may have forgotten all about this particular liability; and yet the effect of the deed of gift would be just the same as if he had actually intended to deprive his creditors of their due." The authorities on which he relies to support this opinion are the two cases in 3 N. L. R. 274 and 5 N. L. R. 196. But I think there is a fallacy here in the use of the word "defraud" in two senses. A creditor is

Carpen Chetty v. Christina Hamy

not necessarily "defrauded" when he fails to get his debt paid.

A creditor who asked of the Court to declare a gift to have been fraudulent and void as against him of course must allege and prove the fraud. And proof that the donor at the time of making the gift knew of his indebtedness to the creditor and knew that the gift left him without the means of paying the debt is strong evidence of the fraudulent intention. So also is the fact that the gift included practically the whole of the donor's property, and that he had (or perhaps even that he was likely to have) debts which he would not be able to pay without the help of the property so given away. But those are matters of evidence; the essential thing for the plaintiff is to allege and prove fraud. And until the deed of gift is declared by the Court to have been fraudulent and is set aside the property remains vested in the donee.

This plaint, therefore, is defective in that it does not allege fraud. The Court would surely have given the plaintiff leave to amend, and I do not know why he did not ask for leave; but apparently he has not done so hitherto. He has elected to stand or fall by the decision of the issue of law. I am very unwilling that the defendants should succeed, because so far as I can see they have "no merits". But in my opinion the plaint is defective in not alleging fraud, and the judgment of the District Court should be set aside and the action dismissed with costs in both courts.

I ought to add that, as regards the 1st defendant, it seems from the plaintiff's admission, and from a perusal of the deed of gift, that she is entitled to a life interest independently of the deed of gift; the deed merely states that the son is to take subject to the life interest which the 1st defendant already had.

WENDT, J.—As I understand the law, an alienation of property such as that we are concerned with is voidable only; it remains good until set aside. And it can be set aside at the instance of a creditor only on the ground of fraud. To establish that fraud he must show both the *animus fraudandi* and the fact of consequent loss to him. The one without the other is not sufficient. And what it is necessary

for him to establish it is necessary for him to plead. It is not sufficient to plead facts—that is, evidence—from which the Court might infer these requisites, if he does not take upon himself to say that fraud exists, which is the foundation of the action. This action has, curiously enough, to be decided on a question of pleading, and my decision is that the plaint is bad. I therefore agree with the Chief Justice that the action must be dismissed.

Pinto v. Ukku

PINTO *vs.* UKKU.

No. 15,913, P. C., Kandy.

Present: Wood Renton, J.

30th September, 1908.

Obstruction—Peace officer searching for toddy—Assistance of renter's peons—Offence under sec. 183, *Ceylon Penal Code.*

It is competent for a peace officer, who has reason to believe that any toddy which has become forfeited and liable to seizure is to be found in any place whatsoever, to search for it in any such place and call to his aid the assistance of any person in doing so; and any person obstructing either the peace officer or any person assisting him is guilty of an offence under sec. 183 of the Ceylon Penal Code.

F. J. de Saram for accused-appellant.

JUDGMENT.

Wood Renton, J.—I have come to the conclusion that this appeal must be dismissed.

The appellant was charged with obstructing the peace officer of Kadugannawa in the execution of a search warrant for fermented toddy, alleged to have been in the unlawful possession of the accused. She was convicted and sentenced to two months' rigorous imprisonment.

On her behalf Mr. de Saram urged several points. In the first place, that, as the actual obstruction was offered not to the peace officer himself, but to the peons of the arrack renter, who were assisting him in the search, there could be no conviction under sec. 183 of the Penal Code in view of the

Pinto v. Ukku

stringency (see secs. 22, 52, 53, and 73) of the Criminal Procedure Code in regard to the execution of search warrants. I am not convinced that this point is good. In view of the generality of the language used in sec. 183 of the Penal Code, I think it is perfectly competent for a public servant, if he is acting at the time in discharge of his public functions, to avail himself of such assistance as the peace officer called to his aid in the present case.

Mr. de Saram's second contention was that the proceedings are bad, inasmuch as the peace officer had not clearly disclosed to the appellant the terms of the search warrant. I think that this argument fails on the evidence.

It was contended by Mr. de Saram, in the third place, that whereas the search warrant, under which the peace officer was acting, gave him authority merely to search the house and "premises" of the accused, the obstruction complained of had taken place in a tea garden at a distance variously stated by the witnesses as being of 30 or 130 yards from that house, and in no way belonging to it, or being subject to any right of entry upon it by the accused. The learned Police Magistrate held that the word "premises" should be interpreted as including any place to which an accused person had access, I presume, whether as a matter of right or not. I entirely agree with Mr. de Saram that this construction of the term "premises" is unsound, and I was in fact in the course of delivering judgment in his favour upon this point this morning when my attention was called by the learned Solicitor-General as *amicus curiæ* to the provisions of sec. 59 of Ordinance No. 10 of 1844, which authorize a peace officer who has reason to believe that any toddy which has become forfeited and liable to seizure under the Ordinance is to be found in any place whatsoever to search for it in any such place and to call to his aid the assistance of any person in doing so. Under the provisions of this section it was competent for the peace officer to avail himself of the services of the peons; it was equally competent for the peons to search for the toddy in the tea estate, and, as the toddy in question had already been seized by them, when obstruction was offered, it was deemed to be forfeited in virtue of sec. 52 of Ordinance No. 10 of 1844, and so for the purposes of the pro-

secution under sec. 183, Penal Code, the peace officer was acting in the discharge of his public functions at the time when the obstruction complained of occurred. I find that this view of the law is sanctioned both by my own judgment, which I confess that I had forgotten, in the case of *Miskin* v. *Velayidan Pulle* [(1907) 3 A. C. R. p. 63], and by the endorsement of the view of the law that I took there by Middleton, J., in *Fernando* v. *Parawathi Nadan* [(1908) 3 A. C. R. p. 61].

On these grounds I dismiss the appeal.

GRANT *vs.* ALAGAMMA.

No. 40,911, P. C., Gampola.

Present: Hutchinson, C. J.

4th December, 1908.

Master and servant—Contract of service—Liability on subsequent contract—Desertion—Labour Ordinance (No. 10 of 1865) sec. 11.

A. was charged for quitting the service of G. without notice. When she took service under G. she was the servant of V. under a contract of service which was still in existence.

Held: That her liability civily or criminally to any penalty for making a contract with G. which she knew she might not be able to carry out does not make the contract void.

Bawa for accused-appellant.

vanLangenberg for complainant-respondent.

Judgment.

Hutchinson, C. J.—The appellant was convicted and fined under sec. 11 of Ordinance No. 11 of 1865 for quitting the service of Mr. Grant, the Superintendent of Sogama Estate, without leave or resasonable cause before the end of her term of service or previous warning. The first objection to the conviction is that at the time when she took service on Sogama Estate she was the servant of one Vytalingam on another estate under a contract of service which was still in existence, and that, therefore, she committed no offence in

quitting Sogama. The argument is that as she was already under a contract to serve Vytalingam it was impossible for her to make a valid contract with Grant for service under him. The words of the Ordinance are: "Any servant who shall quit the service of his employer without leave or reasonable cause," &c. She was certainly a servant as defined in sec. 1, and Grant was her employer. Her liability civilly or criminally to any penalty for making a contract with Grant which she knew she might not be able to carry out does not make the contract void. Another objection is that she had reasonable cause for leaving Sogama—the cause being a threat by Vytalingam to prosecute her for deserting his service if she did not return. The Magistrate was of opinion that no such threat was made; and I am unable, therefore, to find that she had any reasonable cause.

I dismiss the appeal.

CADER *vs.* PERERA.

NO. 12,092, P. C., COLOMBO.

Present: GRENIER, A. J.

ARGUMENT: *18th November, 1908.*

JUDGMENT: *24th November, 1908.*

Security for keeping the peace—Forfeiture of bond—Disorderly conduct —Breach of the peace.

The accused entered into a bond as security for keeping the peace, and the bond expired on the 11th August, 1908. On the 7th October, 1908, he was convicted of being drunk and disorderly on the high road on the 2nd August, 1908. The Magistrate fined him and ordered the forfeiture of the bond.

Held: That the Magistrate was justified in declaring the bond forfeited

It is not the date of the conviction that has to be taken in such a case into consideration, but regard must be had to the date when the offence was actually committed and in respect of which the conviction took place.

Where it was found that the accused was not only drunk and disorderly, but assaulted a rickshaw cooly,

Held: That, even if there had been no assault, a man who is drunk and behaves in a violent and disorderly manner in the public street clearly commits an act, or a series of acts, which involves a breach of the peace.

Cader v. Perera

de Zoysa for apppellant.

c. a. v.

JUDGMENT.

GRENIER, A. J.—The appellant entered into a bond to keep the peace and to be of good behaviour for six months. The bond expired on the 11th August, 1908. He was convicted on the 7th October, 1908, of being drunk and disorderly on the public high road on the 2nd August, 1908, in breach of sec. 23 of Ordinance No. 12 of 1891. The Magistrate fined him Rs. 15, and declared the bond forfeited, and ordered that the sum of Rs. 50 be recovered out of the amount of the bond.

The appellant contends that the order made by the Magistrate is wrong on two grounds. The first is that his conviction having taken place on the 7th October, 1908, at a time when the bond had long expired, the Magistrate was not justified in declaring the bond forfeited. This contention is based on a fallacy, for it is not the date of the conviction that has to be taken into consideration, as, owing to a variety of circumstances, the conviction may not take place until some considerable time after the commission of the offence, but regard must be had to the date when the offence was actually committed, and in respect of which the conviction took place. Here the conviction was of an offence which took place on the 2nd August, 1908, which was within the period covered by the bond. The appellant committed a distinct breach of the bond, and the Magistrate was, therefore, right in declaring it forfeited after he had convicted the appellant.

The second ground was that the offence of which the appellant was convicted did not involve a breach of the peace. The Magistrate has found that the appellant was not only drunk and disorderly, but assaulted a rickshaw cooly. Even if there had been no assault, I would have been prepared to hold that a man who is drunk and behaves in a violent and disorderly manner in the public streets clearly

The Surveyor-General v. de Zilva

commits an act, or a series of acts, which involves a breach of the peace.

There was a further ground advanced by the appellant in his petition of appeal which I think the Magistrate has rightly dealt with. The fact that the Magistrate did not on a previous appropriate occasion declare the bond forfeited is no reason why he should have made the necessary declaration in respect of a subsequent and distinct breach of the bond. All that Mr. Justice Wood Renton held, when the case was before him on a previous appeal, was that, when a Magistrate has before him the fact that a person convicted by him of an offence attended with violence was under recognizance to keep the peace, and does not nevertheless proceed to forfeit such recognizance, it is incompetent for him to inflict a further penalty on a reconsideration of the circumstances. Here the Magistrate found that the appellant had committed another breach of the bond, and, after hearing his counsel who shewed cause, forthwith declared it forfeited.

The appeal must be dismissed.

THE SURVEYOR-GENERAL *vs.* DE ZILVA.

NO. $\frac{1}{15 \text{ of } 1889}$, D. C., KANDY.

Present: WOOD RENTON, J., & GRENIER, A. J.

ARGUMENT: *11th & 12th June, 1908.*

JUDGMENT: *16th June, 1908.*

Surveyor—Cancellation of license—Ordinance No. 15 *of* 1889, *sec.* 8—*Plans certified by Surveyor-General—Rebuttal of presumption of accuracy—Evidence Ordinance, sec.* 60—*Expert evidence—Admissibility of treatises.*

The presumption created by sec. 83 of the Evidence Ordinance as regards surveys and plans of the Surveyor-General extends to everything necessary to be done to make the survey or plan a faithful drawing or measurement of the land surveyed, and includes the selection of proper bases of measurement.

If it is desired to contradict *viva voce* expert evidence by the opinions of the writer of a treatise, the party proposing to adduce such counter testimony must either call the author, or

satisfactorily account for his absence within the meaning of sec. 60 of the Evidence Ordinance.

The Surveyor-General v. de Zilva

Where the presumption created by sec. 83 of the Evidence Ordinance in favour of the Surveyor-General's plans has not been rebutted, and the plans of the surveyor and that of the Surveyor-General shew a discrepancy of 92·93 acres, it cannot be accounted for except on the footing that either the surveyor was ignorant of the elementary principles of surveying, or had done his work so carelessly and negligently as to render him unfit to discharge the duties of a surveyor or with advantage to the public, and has thereby brought himself within both conditions contemplated by sec. 8 of Ordinance No. 15 of 1889.

H. J. C. Pereira (*Kanagasabai* with him) for appellant.

Walter Pereira, K.C., S.-G., for respondent.

c. a. v.

JUDGMENT.

WOOD RENTON, J.—The appellant, Mr. de Zilva, is a Licensed Surveyor. The respondent, the Surveyor-General, took proceedings against him in the District Court of Kandy under sec. 8 of Ordinance No. 15 of 1889, claiming cancellation of his license on the grounds that he (i) had proved himself incapable of discharging his duties with advantage to the public, and (ii) had been guilty of gross misconduct as a surveyor. The learned District Judge held that both those grounds of cancellation had been established against Mr. de Zilva, and directed the cancellation of his license accordingly. Against that order the present appeal is brought.

In May, 1905, Mr. de Zilva was employed by Mr. P. D. G. Clarke, Manager of Nivitigala Estate, to survey certain lands in the villages of Howpe and Horatinella. Mr. Clarke was negotiating for the sale of those lands to the Ceylon Tea Plantations Company, and the survey was necessary for the purpose of obtaining a certificate of quiet possession from Government. It does not clearly result from the evidence that Mr. de Zilva was aware of this fact at the time when the survey was made. The survey when completed was, however, submitted to Government, and ultimately the Surveyor-General instituted these proceedings on the strength of alleged inaccurate and worthless character for the cancellation of Mr. Zilva's license. It is admitted that Mr. Zilva's survey and plan showed the extent of the lands in question to be

The Surveyor-General v. de Zilva

1,434 acres and 10 perches, whereas according to the Government survey and plan the true extent is only 1,341 acres and 17 perches. The Surveyor-General in his petitton and in the evidence adduced at the inquiry attacked Mr. Zilva's methods of working in detail. But the main issues in the case are whether in point of fact Mr. Zilva in calculating an area of 1,300 or 1,400 acres was wrong to an extent of nearly 93 acres, and in the 2nd place whether an error of that description comes under one or other or both of the two grounds of concellation laid down in sec. 8 of Ordinance No. 15 of 1889.

If the surveys and plans of the Surveyor-General are correct, the error was made. Sec. 83 of the Evidence Ordinance requires the Court to presume the accuracy of such surveys and plans if they purport—as those in issue in the present case do—to be signed by or on behalf of the Surveyor-General, I think that the presumption created by this section extends to everything necessary to be done in order to make the survey or plan a faithful drawing or measurement of the land surveyed, and includes, therefore, the selection of proper bases of measurement. The presumption in question is only, however, a presumption of fact, and Mr. H. J. C. Pereira contended that in the present case he had rebutted it sufficiently to entitle him to an independent survey of the whole area before his client's work was condemned as unskilful. I am unable to adopt this view. The mere fact that Mr. de Zilva had gone over the ground and had arrived at different results from those of the Survey Office is not under the circumstances of this case sufficient to displace the statutory presumption. Mr. Benzie, his witness, did dot personally check Mr. de Zilva's work; and in considering the weight due to his opinion as to the necessity of a re-survey the possibility of an unconscious bias in favour of Mr. de Zilva, who was formerly his pupil, and the fact that he has admittedly no knowledge of the changes in the Ceylon Survey System since 1893, have to be kept in view. The passages to which Mr. Pereira referred us in the Administration of Mr. Grinlinton (1898, B vii. pp. B 2, 3; 1889, B iii., p. B 2) in Mr. Barnard's contributions to Mr. Warren's Administration Reports for 1902 (B iv. p. 10), and for 1904 (B v. p. M. 18) do not in my opinion help the appellant, in view of Mr. Barnard's evidence in re-

The Surveyor-General v. de Zilva

gard to them. The passages on which Mr. Perera mainly relied are these: "An error in the triangulation," says Mr. Grinllnton, "and irregularities which are being inquired into have led to an overlap in the survey which will take a long time to correct, and which will prevent the issue of preliminary plans of the northern block this year." The statement relates to the Province of Sabaragamuwa. In his report on Trigonometrical Surveys (Warren's Administration Report, 1902, B iv. at B 10) Mr. Barnard says: "The discrepancy in latitude at Delft between the Ceylon triangulation and the Southern Indian system led me to investigate the value of the original astronomical observations taken at Colombo in 1860, upon which the trigonometrical latitudes are based The results have proved that these observations are to be considered only as a very rough approximation to the truth." In the corresponding report for 1904 (B v. at p. M. 18) we find the following: "The usual routine work was heavier at the beginning of 1904 than in previous years owing to the large number of points required for the extension of the Topographical Surveys in Uva. This led to a certain amount of revision of the old work in that Province with the object of placing some of the minor stations on the new fixing, but without much success on account of the inaccuracy of the old observation............certain abnormal misclosures in triangles............rendered it advisable for me to investigate the causes of such discrepancies with a more accurate instrument."

Even if they stood unexplained, I do not know that it would be fair to treat statements of this description as involving an admission on the part of the Survey Office of the present inaccuracy of its surveys and plans for practical purposes. But Mr. Barnard, whose good faith and whose knowledge on such subjects are not challenged, has told us that no admission of the kind was intended. "The remarks made in the Report of 1898," he says, "would not apply in any way to the bases selected by Mr. Dawson. They have reference to something quite different, namely, ordinary check pole work, and to triangles of a lower class even than minor triangles. My remarks (in the Report of 1902) are purely scientific, and are not intended to convey the impression that

The Surveyor-General v. de Zilva

a survey made on that triangle action would be erroneous or even inaccurate." "The misclosures," Mr. Barnard also says, "mentioned in my Report of 1904 have merely scientific interest, and refer only to a very small number of seconds. This report only refers to a subsidiary line of triangles on the north-east portion of the Island and............has nothing to do with the present case." Mr. Barnard then produced a diagram (B. C.) of the Trigonometical Survey of Ceylon shewing the principal triangulation of the Island in thick lines, and proceeded: "If any of the angles depicted in the triangle with thick lines are in error, it indicates an error of the triangulation of the Island. The angles included by these thick lines are checked, and re-checked, and computed so often that it would be absolutely impossible that any error should remain undetected." I have quoted these passages, not as constituting affirmative evidence of the accuracy of the plans of the Survey Office, but as showing that the expression of opinion in the Surveyor-General's Administration Reports which Mr. Pereira cited cannot be utilised by the appellant for the purpose of rebutting the statutory presumption in favour of their accuracy. I think that presumption stands; and the evidence of Mr. Dawson, Mr. Stronach, Mr. Warren, Mr. Ridout, and Mr. Barnard justified the learned District Judge in holding as he did that the error imputed by the Surveyor-General to Mr. de Zilva had been committed.

Was it then an error which proved Mr. de Zilva (i) to be incapable of discharging his duties as a licensed surveyor with advantage to the public, and (ii) to have been guilty of gross misconduct in the discharge of his duties as a surveyor? There is nothing in the evidence which would have justified a finding of fraudulent misconduct against Mr. de Zilva; and I desire speaking for myself to say that, while affirming the judgment under appeal, I am far from endorsing some of the language in which it is couched, or the rapidity with which on his own showing the learned Judge made up his mind against the appellant. But if it be true, as the witnesses examined on behalf of the Surveyor-General declare, in the first place that Mr. de Zilva's errors—one of which at least, viz., the miscalculation of 92-93 acres—even the lay mind feels to be startling—not only were not permissible, but were

The Surveyor-General v. de Zilva

errors in the elementary principles of surveying, and, in the second place, that he must have known that the work which he was deliberately putting forward as accurate was work tainted with errors of this character, he has, I think, brought himself within both the conditions contemplated by sec. 8 of Ordinance No. 15 of 1889; he has proved himself unfit to exercise his profession with advantage to the public, and has also been guilty—even in the absence of fraud—of gross professional misconduct. Mr. Warren, Mr. Dawson, Mr. Stronach, Mr. Ridout, and Mr. Barnard are witnesses against whose credibility no suggestion has been made; and they are undoubtedly experts in the eye of the law. The unanimity and the weight of their evidence in regard to the points that I am dealing with are not really weakened by such casual admissions as the one made by Mr. Warren in cross-examination: "I could not blame a licensed surveyor for having been guided by books such as have been shown me"; for if the Surveyor-General's case was well founded, Mr. de Zilva's operations contained errors such as a misclosure of 26 minutes in 77 bearings for which it would be difficult to furnish any kind of justification. On the other side there was merely the evidence of Mr. de Zilva himself and of Mr. Benzie, to whom I have already referred. For the text-books which the appellant's Counsel relied upon were clearly inadmissible, unless he first satisfied sec. 60 of the Evidence Ordinance by proof that their authors were dead, or could not "be found", or had become incapable of giving evidence, "or could not be called as witnesses" without an amount of delay or expense which the Court regarded as unreasonable. I conceive that there is nothing in sec. 60 of the Evidence Ordinance to prevent the cross-xamination of an expert witness as to opinions expressed in such treatises. If the witness accepts the author's view, he makes it his own; and apart from that the knowledge or lack of knowledge that he displays of the writings of other experts may be of value in determining the weight that his testimony deserves. But if it is desired to go further than this and to contradict *viva voce* expert evidence by the opinions of the writer of a treatise, the party proposing to adduce such counter testimony must either call the author or satisfactorily account for his absence within the meaning of

The Surveyor-General v. de Zilva

sec. 60 of the Evidence Ordinance. There are obvious reasons why the provisions of that enactment should be strictly enforced. The expert witness who presents himself in court can be cross-examined as to the grounds of his opinion and his qualifications for forming them. The absent author speaks from the pages of his work *ex cathedra*, and, as in the case of some of the experts mentioned by Mr. Pereira, the description that he gives of himself on the title page may convey little or no meaning to a lay tribunal. In the result I am not prepared to differ from the findings of the District Judge either as to the main error of 92-93 acres or as to the incidental errors in Mr. de Zilva's method of working, the evidence in regard to which I have carefully considered, though I have not examined it here in detail.

I would dismiss this appeal with costs.

GRENIER, A. J.—I agree to affirm the order appealed from. The presumption in regard to the correctness of the Surveyor-General's plans has not been rebutted by the appellant. Certainly the appellant's evidence has not shaken the ground-work of the case which has been built up against him by the expert and scientific evidence to be found in the record. No imputation has been cast on the honesty or good faith of witnesses like Mr. Warren, Mr. Dawson, Mr. Barnard, Mr. Ridout, and Mr. Stronach; and a careful consideration of their evidence shows that the discrepancy of 92 acres between the appellant's survey and plans and the Surveyor-General's cannot be accounted for except on the footing that the appellant was either ignorant of the elementary principles of surveying, especially with reference to misclosures such as have been pointed out to us at the argument, or had done his work so carelessly and negligently as to render him unfit to discharge the duties of a surveyor with advantage to the public.

I am of the same opinion as my brother on the question of the admissibility of the books on surveying which were sought to be used in evidence in the court below. They were clearly inadmissible in view of the express provisions contained in sec. 60 of the Evidence Ordinance. The reasons

given by my brother for their exclusion are cogent ones, and I cannot add anything to them.

The appellant's counsel pointed out to us that the District Judge had made up his mind against his client at a very early stage of the procedings, after he had recorded Mr. Dawson's evidence. I need hardly say that this was wrong, and that the District Judge should have waited until he had the whole evidence before him, and then have expressed his opinion. At the same time I find that the evidence both for the appellant and against him has been recorded with much care and with a wealth of technical details, and the appellant's case did not suffer in the slightest degree before us in consequence of the District Judge's premature expression of opinion, because everything that could possibly have been argued in support of the appeal was well and ably argued both by Mr. H. J. C. Pereira and Mr. Kanagasabai.

There can be no doubt that the configuration of the land in the Surveyor-General's plan and survey is the same as that in the appellant's, and it goes without saying that the discrepancy of 92 acres is too large and serious to be lightly accounted for. The appellant's case is, however, that his survey and calculation as to the extent are correct, and the Surveyor-General's are all wrong. The appellant has signally failed to establish his proposition, and thus rebut the presumption created by sec. 60 of the Evidence Ordinance. To my mind there would not have been this large discrepancy of 92 acres if the appellant knew his work and was competent to discharge his duties as a surveyor. His incompetency has been fully established by the evidence, and I would, therefore, affirm the order of the court below and dismiss this appeal.

Kindersley v. David

KINDERSLEY *vs.* DAVID.

NO. 26,420, P. C., MATARA.

Present: GRENIER, A. J.

ARGUMENT: *13th November, 1908.*

JUDGMENT: *24th November, 1908.*

False information—Chairman, Local Board—Public servant—Sec. 19, *Penal Code—Sec.* 180, *Penal Code—Nature of information.*

The Chairman of a Local Board is a public servant within the meaning of sec. 19 of the Ceylon Penal Code.

The Chairman of a Local Board is not a public servant within the meaning of sec. 180 of the Ceylon Penal Code.

An offence under sec. 180 of the Ceylon Penal Code is committed in cases where a person gives information to a public servant who has power to be exercised by him to the direct and immediate prejudice of another against whom the information is given.

Information given against a person to a public servant, who had to pass it on to another, if any prejudice was to be caused thereby, might be an offence under sec. 180 of the Ceylon Penal Code if the informant intended that the public servant should pass the information to the person or persons who had power to deal with the information complained against.

Where the information given is of a criminal nature no proceedings should be taken under sec. 180 until the criminal charge is disposed of.

Allan Drieberg for accused-appellant.

Bawa for respondent.

c. a. v.

JUDGMENT.

GRENIER, A. J.—I will assume the correctness of the Magistrate's findings on the facts, subject to what I shall say presently. I was in doubt, however, at the argument whether the complainant, who is the *ex officio* Chairman of the Local Board of Matara, his substantive appointment being that of Assistant Government Agent, was such a public servant as is contemplated by sec. 180 of the Penal Code. I think it was not seriously contested that he was a public servant within the meaning of sec. 19. The definition there given of a

Kindersley v. David

public servant is comprehensive enough to embrace the complainant in his capacity of Chairman of the Local Board, because I find that even a division officer under the Road Ordinance of 1861 is made to fall under the description of a public servant. Besides it seems impossible to disconnect the status of the complainant as a member of the Civil Service, which undoubtedly invests him with the legal character of a public servant, from his incidental position as a Chairman of the Local Board.

The question is, whether the complainant had it in his lawful power as Chairman of the Local Board to cause injury to the person against whom the information, which has not been very clearly found to be false, and false to the knowledge of the informant, was given. The person informed against was the Inspector of the Local Board; and it was alleged against him by the appellant in a petition that he presented to the Chairman that he had misappropriated a sum of Rs. 2·50. The word "injury" has received a fairly exhaustive definition in sec. 43 of the Penal Code. The section runs as follows: "The word injury denotes any harm whatever illegally caused to any person in body, mind, reputation, or property." It was argued for the appellant that the Chairman, Local Board, had no power or authority to act by himself independently of the Board. This is true, and was conceded by respondent. The Chairman presides over the deliberations of the Board; and any action that is subsequently taken is the action of the body corporate, and not of the Chairman or any member singly. Can it be said therefore that the complainant was such a public servant, that he was able to use his lawful power to the injury of the Inspector of the Local Board? I am strongly of opinion that the offence under sec. 180 is committed in cases where a person gives information to a public servant who has power to be exercised by him to the direct and immediate prejudice of another against whom the information is given. I think I said so at the argument, and made reference to the first illustration under sec. 180, which applies to the case of false information being given to the Inspector-General of Police against a public officer whom it was in his power to dismiss. I have been strengthened in my opinion by the ruling of the High Court of Bombay, which I

Kindersley v. David

was not aware of at the time in the unreported case of *Shripate Warnan* (1897), to which reference is made on p. 227 of the Law of Crimes by Ratanlal and Dhirajlal. The section of the Indian Penal Code (182) is word for word the same as ours (180). In the case of *Reg.* v. *Perianan*, and *Reg.* v. *Naraina*, 4 I. L. R. Mad. p. 241, it was held that sec. 182 did not apply where the public servant misinformed is only competent to pass, and passes, on information, and the power to be exercised by him cannot tend to any direct or immediate prejudice of the person against whom the information is levelled.

It seems to me that it is of the utmost importance to ascertain in a case of this kind whether or not it was in the lawful power of the public servant to whom the false information was given to act in such a manner, and so directly, and perhaps effectually, as to cause injury to the person complained against. That is the test which in my opinion has to be applied in regard to an offence under sec. 180. In this case it is clear that the complainant as Chairman of the Local Board had no immediate and independent authority to act on the false information given to him so as to cause injury to the Inspector of the Local Board. He certainly had not the power to dismiss that officer. The matter had to be laid before the Board, and it was necessary that there should be the conjoint action of the Chairman and the Board before the Inspector could be injured in the sense in which the word "injury" is used in the section. If it was in the power of the Chairman acting by himself to dismiss the Inspector without any reference whatever to the Board, the case would have been free from doubt; but here, although it cannot be said that the Chairman was the servant of the Board, as contendedf or in the Court below, he certainly did not occupy the position of one who had power and authority to cause direct and immediate injury to the person complained against.

In the case of *Perera* v. *de Silva*, 4 A. C. R. p. 33, it was decided by Layard, C.J., following the judgment of the Madras High Court in the case of *Regina* v. *Perianan* to which I have already referred, and the judgment of Mr. Justice Lawrie, reported in Koch's Reports p. 281, that where the false information

Kindersley v, David

was given to a District Traffic Superintendent, who was only a subordinate officer in the Ceylon Government Railway, and who could not without reference to higher authority exercise any power which would cause injury to the complainant, no offence under sec. 180 of the Penal Code had been committed. I apprehend that the principle upon which that case was decided, so far as it could be ascertained from the terms of sec. 180, was that the District Superintendent had no independent and distinct lawful power or authority which he could use to cause injury. He had to pass the information on to his superior officer, who I presume had such power and authority. Applying the same principle to the present case, it may fairly be argued, and I think with reason and justice, that the Chairman without being in the position of a subordinate officer had still to pass on or convey the information to the Board before he and the Board could act together in the matter. As was pointed out by Layard, C. J., in the case of *Perera* v. *de Silva*, Mayne in his treatise on the Criminal Law of India expressed some doubts as to the correctness of the decision in the case of *Regina* v. *Perianan*. Mayne said: "The Madras High Court has held that false information given to a village magistrate who could not himself act upon it, but could only pass it on to some higher authority, did not come within the words of this section. They thought that the words "to use his lawful power" referred to some power to be exercised by the officer misinformed, which shall tend to some direct and immediate prejudice of the person against whom the information is levelled. But conceding this to be so, surely information given to and for the purpose of being passed on to B, and which it was his burden duly so to pass on, must be considered as having been given and intended to be given to B." The learned author appears to have assumed that the information was given to A for the purpose of being passed on to B. Perhaps the facts of the particular case he was dealing with justified his saying so; in which event, no doubt, it could fairly be said that the informant simply made use of A as a conduit pipe for the information that he actually intended for B, and any information therefore given to A was in reality and effect given to B.

Assuming that Mayne's criticism is correct and well

Kindersley v. David

founded, there is no evidence from which I can infer that the appellant in giving false information to the Chairman did so for the purpose of its being passed on to the Board. Even if there was evidence, it would not help the prosecution, because the Board neither collectively nor individually occupied the position of public servants superior to the Chairman, and having the necessary lawful power as such public servants to use it to the injury of the person informed against. It is quite a different matter that the Board had the power by its constitution to dismiss any of its employees. There is, however, another point which was apparently lost sight of in the court below and not adverted to at the argument of the appeal. That point was decided in the case of *The Empress* v. *Jamni*, 5 All. 387, and it was there held that where the information given is a charge of a criminal nature no proceedings should be taken under sec. 182 until the criminal charge is disposed of. I agree with that ruling.

Now, the appellant made a distinct charge against the Inspector of misappropriating a sum of money which he should have credited or paid over to the Local Board. The charge was a criminal one, and the appellant should have been directed to make his complaint either directly to the Police Magistrate or to the Police, who would no doubt have taken action in the matter.

That does does not appear to have been done, but procedings were in effect ordered by the Chairman, after an informal inquiry had been held by him (document B), to be taken by the Inspector against the appellant under sec. 180 of the Penal Code on the assumption that the information given by him was false. Possibly had the proper procedure been followed the appellant would have been in a position to prove that the Inspector had taken a sum of Rs. 2·50 from him for which he had not accounted to the Board, instead of being in the disadvantageous situation of an accused charged prematurely with an offence under section 180. If the charge was a false one, the appellant should have been proceeded against under section 208. For the reasons I have given I would hold that the complainant as Chairman of the Local Board is not a public servant within the meaning of

section 180 of the Penal Code, and that the accused has committed no offence under that section. *Kindersley v. David*

I must confess that I am glad to have arrived at this decision on the law because I am not satisfied upon the evidence that the charge made by the appellant against the Inspector was entirely false.

I set aside the conviction and acquit the accused.

THE

APPEAL COURT REPORTS.

APPENDIX.

[Extract from the *Government Gazette* of 13th November, 1908.]

The following Order made by the Judges of the Supreme Court under section 53 of "The Courts Ordinances, 1889 and 1901", for regulating the mode of prosecuting Civil Appeals in the Supreme Court, has been laid before the Legislative Council, and unless annulled by the Council within forty days, it will be proclaimed in the *Government Gazette* and come into force accordingly.

By His Excellency's command,

HUGH CLIFFORD,
Colonial Secretary.

Colonial Secretary's Office,
Colombo, November 12, 1908.

Order for Regulating the mode of Prosecuting Civil Appeals in the Supreme Court, made by the Judges under section 53 of "The Courts Ordinances, 1889 and 1901".

We, the Honourable Sir Joseph Turner Hutchinson, Knight, Chief Justice of the Island of Ceylon, and the Honourable Henry Lorenz Wendt, Puisne Justice of the Supreme Court of the Island of Ceylon, and the Honourable Alexander Wood Renton, Puisne Justice of the said Court, and the Honourable Joseph Grenier, Acting Puisne Justice of the said Court, do hereby, in pursuance and execution of the powers given by "The Courts Ordinances, 1889 and 1901", and all other powers and authorities enabling Us in this behalf, order and direct in manner following :—

1. "The Civil Appellate Rules of 1900" are hereby annulled, and the following rules shall stand in lieu thereof :—

(1) (*a*) In every civil appeal preferred after December 31, 1908, the appellant shall furnish to the Registrar, for use

of each of the Judges who shall sit on the hearing of the appeal, a printed or typewritten copy of so much of the record of the case as may be necessary for the decision of the appeal.

(*b*) The costs of such copies shall be costs in the appeal, and shall be dealt with accordingly.

(2) The Registrar of the Supreme Court shall, upon the appplication in writing of any party to the action or proceeding, supply him with typewritten copies of the whole or such part of the record as may be specified in such application, upon payment according to the scale in the schedule. Provided that it shall be competent for such Registrar, where the record is exceptionally voluminous, to require for such copies payment of a higher charge not exceeding by more than one-half the rates set forth in such schedule. Provided also that in the event of a party applying for more than one copy, it shall be competent for the Registrar to charge for each such additional copy at the higher rate in the last proviso mentioned. Such payment shall be made by judicial stamps to be affixed to the application, and every such application shall state the value of the subject-matter and the nature of the action or proceeding in respect of which such application is made.

(3) If the appellant shall not lodge with the Registrar the copies of the record for the use of the Court, or duly make application under rule 2 for copies of the record within one month from the date of the receipt of the petition of appeal in the Supreme Court Registry, or within such further time as the Court or a Judge shall in the circumstances consider reasonable, the Court or Judge may order the appeal to be dismissed.

(4) All petitions of appeal which are drawn and signed by an advocate or proctor shall be printed or typewritten, or written in good round clerk's hand, on machine-made cream-laid foolscap paper of 14 pounds weight per mill ream or thereabouts.

(5) This Order may be cited as "The Civil Appellate Rules of 1908", and shall come into operation on the First day of January, One thousand Nine hundred and Nine.

The Schedule of Fees.

Final Appeals from the District Court.

	First Class.	Second Class.	Third Class.	Fourth Class.	Fifth Class.	Sixth Class.
Where the action or proceedings involves property or rights of the value of	Rs. 500 and under	Over Rs. 500 and under Rs. 1,000	Rs. 1,000 and under Rs. 5,000	Rs. 5,000 and under Rs. 10,000	Rs. 10,000 and under Rs. 20,000	Rs. 20,000 and above
	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.
Payable by the appellantfor one copy (including two copies for the Judges)	4 ...	5 ...	6 ...	8 ...	10 ...	15
Payable by the respondent for one copy	4 ...	5 ...	6 ...	8 ...	10 ...	15

Fines appeal in partition actions whatever the value of the land shall be charged as in Class III.; in matrimonial cases, as in Class IV.; in actions relating to public charities under chapter XLV. of the Civil Procedure Code, as in Class IV.; in actions under the Inventions Ordinance, 1906, as in Class V.

Interlocutory Appeals from District Courts.

	In Partition Actions. Rs.		In all other Interlocutory Appeals. Rs.
Payable by the appellant for one copy (including two copies for the Judges)...	6	...	4
Payable by the respondent for one copy ...	6	...	4

Appeals from the Courts of Requests.

	Rs.
Payable by the appellant for one copy (including one copy for the Judge)	3
Payable by the respondent for one copy	3

Appeals to be heard in Review.

	Rs. cts
Payable by the appellant for one copy (including three copies for the Judges)	17 50
Payable by the respondent for one copy ...	17 50

Dated at Colombo, this 2nd day of November, 1908.

J. T. HUTCHINSON,
Chief Justice.

H. L. WENDT,
Puisne Justice.

A. WOOD RENTON,
Puisne Justice.

JOSEPH GRENIER,
Acting Puisne Justice.

I certify that this is a true copy of the rules made by the Judges of the Supreme Court under the provisions of section. 53 of "The Courts Ordinance, 1889 and 1901".

J. T. HUTCHINSON,
Chief Justice.

November 2, 1908.

SUPPLEMENT

TO THE

APPEAL COURT REPORTS.

KING *vs.* DHARMAWARDENE *et al.*

No. 1,873, D. C. (Cr.), KANDY.

10th June, 1908.

Forged document—Abetting—Valuable security—Jurisdiction of District Court—Penal Code, secs. 102, 456 & 459.

Per HUTCHINSON, C. J.:—In a charge under secs. 102 and 459 of the Penal Code of abetting the offence of using a forged document, the document being one of the kind mentioned in sec. 456, viz., a valuable security, the District Court has jurisdiction to hear the charge.

Queen v. *Perera* (3 N. L R. p. 131) followed.

In the matter of the Estate of RENGASWAMY, deceased.

No. 1,980, D. C., KANDY.

10th June, 1908.

Judge, powers of—Alteration of order made by predecessor in office.

The petitioner applied by petition to Court under chap. 55 of the Civil Procedure Code for an order for the judicial settlement of the account of the administratrix of the estate of the deceased in which they claimed to be interested.

The matter was fixed for enquiry, and on the day it came up for hearing the petitioner applied for a postponement on the ground that he was not ready. The District Judge (who was not the judge who entertained the petition) said that the petition was in his opinion one which should never have been entertained, except on security being given, and he allowed the postponement only on condition the petitioner deposited a sum of Rs. 500 in Court for the costs of the respondents; if the deposit was not made within one month, the petition would be dismissed.

Held, per HUTCHINSON, C. J., & WOOD RENTON, J.:—That the order was one which the judge had no power to make. Whether the order of the original judge was right or wrong his successor in office was bound by it, and should have treated it as a proper order.

ANDRIS APPU *vs.* DANIEL.

No. 5,749, D. C., GALLE.

15th June, 1908.

Buddhist temporalities—Proper person to sue or be sued.

Per WOOD RENTON, J., & GRENIER, A. J.:—The effect of the Buddhist Temporalaties Ordinance No. 8 of 1905 is to make the duly appointed trustee the person who is to sue or be sued in connection with temple property. The scope of the statute clearly results from the language which the legislature has itself employed.

SUPPLEMENT TO THE APPEAL COURT REPORTS.

THE SURVEYOR-GENERAL *vs.* DE SILVA.

No. $\frac{1}{15}$ of 1889, D. C., KANDY.

16th June, 1908.

Evidence—Accuracy of survey plan—Evidence Ordinance, sec. 83—Presumption—Bases of measurement.

Per WOOD RENTON, J.:—Sec. 83 of the Evidence Ordinance requires the Court to presume the accuracy of surveys and plans if they purport to be signed by, or on behalf of, the Surveyor-General; the presumption created by this section extends to everything necessary to be done in order to make the survey or plan a faithful drawing and measurement of the land surveyed, and includes, therefore, the selection of proper bases of measurement.

WICKREMESINGHE *vs.* BATTA.

No. 1,132, P. C., KURUNEGALLE.

19th June, 1908.

Arrack Ordinance—Ordinance No. 10 of 1844 secs. 46, 51 & 59—Peace officer -Power to seize fermented toddy.

Per GRENIER, A. J.:—Secs. 46, 51, and 59 of the Arrack Ordinance No. 10 of 1844 gives a peace officer the right to seize fermented toddy.

GUNESEKERE *vs.* CHRISTINA-HAMY.

No. 10,152, P. C., NEGOMBO.

19th June, 1908.

Public nuisance—Penal Code, sec. 282—N gligence with respect to animals.

Per GRENIER, A. J.:—Sec. 282 of the Penal Code includes any kind of animal which is likely to cause danger to human life or any probable danger of grievous hurt.

MENCHI NONA *vs.* HENDI SINNO.

No. 31,654, P. C., BALAPITIYA.

22nd June, 1908.

Maintenance—Paternity—Corroboration of mother's evidence.

The respondent was ordered to pay maintenance for his illegitimate child, and it was contended in appeal that there was not sufficient corroboration of the mother's statement that the respondent was the father of the child;

Held, per HUTCHINSON, C. J.:—That evidence of a proposal of marriage between the parties and that the respondent had lived for some time in the same house with the woman was sufficient corroboration.

BANDA *vs.* RAMASAMY.

No. 2,690, P. C., NUWARA ELIYA.

26th June, 1908.

Admission of guilt—Unqualified admission—Criminal Procedure Code, sec. 188.

The accused in this case was charged with the theft of galvanized roofing, worth Rs. 3, when he made the following statement to the Magistrate:—"When the late D. M. O. was leaving, these galvanized sheets were on the ground. I went to his lady and asked if I might have them. She said I might. So I took them. They came from a cattle shed used by the D.M.O. It was put up by Dr. Pieris, and improved by the late D. M. O. When he left he pulled it down."

On a subsequent day the parties were present, and the Magistrate made this record: "Accused is unable to prove his statement that the D. M. O.'s wife gave him leave to take the sheets. He has taken no steps to summon her. In any case she had no authority to give them, and I do not believe she gave any such leave." The accused was convicted.

Held, per GRENIER, A. J.:—That the accused's statement was in no sense an unqualified admission of guilt as required by sec. 188 of the Criminal Procedure Code.

In the matter of the Estate of JAMES PERERA, deceased.

No. 2,191, D. C., Kandy.

28th June, 1908.

Intestate succession—Adulterine bastards—Children born ex prohibito concubitu*—Right to mother's estate—Access—Admissibility of husband's evidence—Evidence Ordinance (No. 14 of 1895), secs. 112 & 120.*

Per HUTCHINSON, C. J., & WOOD RENTON, J.:—Adultery being no longer an offence in Ceylon children born in adultery are not now born *ex prohibito concubitu*, and can therefore inherit their mother's estate with her legitimate children.

A husband is a competent witness to prove that he had no access to his wife.

PONNAMMA *vs.* WEERASOORIA *et al.*

No. 836, D. C., TANGALLE.

6th July, 1908.

Fiscal's sale—Issue of conveyance after institution of action—Title—Prescription.

A. purchased a land at a Fiscal's sale and conveyed it on 27th January, 1905, to B., who instituted an action against C. for declaration of title and ejectment, and in it called upon A. to warrant and defend his title or return the purchase money. The fiscal's sale to A. was confirmed on the 11th April, 1901, but conveyance did not issue till 14th July, 1906. The present action by B. was instituted on 5th July, 1906.

Held, per WOOD RENTON, J., & GRENIER, A. J.:—That the Fiscal's transfer having issued after the institution of action it came too late to confer title for the purpose of the present proceedings.

Abubakker v. *Kalu Etena* (9 S. C. C. p. 32) and *Sello* v. *Raphiel* (1 S. C. R. p. 73) distinguished.

That the fiscal's sale, though imperfect in the absence of a conveyance, clearly formed a legal starting point for a title by prescription.

SILVA *et al. vs.* SILVA *et al.*

No. 8,412, D. C., GALLE.

7th July, 1908.

Partition action—Claim for compensation—Admissibility.

Per GRENIER, A. J., & WOOD RENTON, J.:—That a claim for compensation cannot be included in a partition action.

PERERA *vs.* PERERA.

No. 4,400, C. R., KALUTARA.

7th July, 1908.

Writ—Re-issue—Small Tenements Ordinance (No. 11 of 1882)—Loss of record—Refusal—Validity.

Per HUTCHINSON, C. J.:—Application for a re-issue of writ of posses-

sion under Ordinance No. 11 of 1882 should not be refused because the record has been lost. The original writ together with the fiscal's return to it and the uncontradicted affidavit of the plaintiff is sufficient evidence of the decree.

GOVERNMENT AGENT, W. P., *vs.* COOREY *et al.*

No. 2,235, D. C., Colombo.

7th July, 1908.

Land acquisition—Claim by lessee of claimants for compensation.

To a land acquisition case was joined an action for compensation in respect of certain improvements alleged to have been made by the lessees of two of the claimants, and for damages in consequence of the lease having been determined before the expiration of the term agreed upon.

Held, per WOOD RENTON, J., & GRENIER, A. J.:—That there was no provision in the Ordinance No. 3 of 1876 for a claim of this description.

THEONIS *vs.* SIMANIS.

No. 31,790, P. C., BALAPITIYA.

22nd July, 1908.

Mischief—Evidence of serious wounds —Jurisdiction of Police Magistrate.

Per WENDT, J.:—The fact that serious wounds were inflicted on the complainant does not deprive the Police Magistrate of jurisdiction under sec. 80 of the Penal Code to hear a charge of behaving in a disorderly manner on the public road.

King v. *Jayawardene* (2 A. C. R. p. 97) distinguished.

FALLIL *vs.* VEERAPPEN.

No. 6,384, P. C., HATTON.

24th July, 1908.

Breach of peace—Jurisdiction of Police Magistrate to require security to keep the peace—Sec. 287, *Penal Code—Sec.* 80, *Criminal Procedure Code.*

Per WENDT, J.:—Using obscene language, an offence under sec. 287 of the Penal Code, does not "involve" breach of the peace; and where there is no proof of such a breach a Police Magistrate has no jurisdiction to require security to keep the peace under sec. 80 of the Criminal Procedure Code; and in no case can the term of the bond be for more than 6 months, which is the maximum fixed by sec. 80 of the Criminal Procedure Code.

THE KING *vs.* PODI SINNO.

No. 1,993, D. C. (Cr.), COLOMBO.

25th July, 1908.

Robbery—Conviction for theft—Sec. 183, *Criminal Procedure Code.*

Where a man who was indicted for the offence of robbery under sec. 380 of the Penal Code was convicted of the offence of theft under sec. 367 of the Penal Code,

Held, per WENDT, J.:—That sec. 183 of Criminal Procedure Code supports the action of the District Judge in convicting the accused of the offence of theft.

GOONETILLEKE *vs.* ALLIS *et al.*

No. 28,146, P. C., PANADURE.

28th July, 1908.

Gaming—Keeping a gaming place—Joinder of charges—Sec. 180, *Civil Procedure Code.*

Per HUTCHINSON, C. J.:—The charges of gaming and of keeping a gaming house could be joined under sec. 180 of the Civil Procedure Code.

SUPPLEMENT TO THE APPEAL COURT REPORTS.

FERNANDO *vs.* ANTHONIPILLAI.

No. 9,529, C. R., Kayts.

18th August, 1908.

Costs—Power of Court—Apportionment—Secs. 210 *&* 211, *Civil Procedure Code.*

Per Wood Renton, J.:—Sec. 210 of the Civil Procedure Code enables and directs the Court to say in its decree by whom the costs of "each party" are to be paid; and 211 gives it full power to apportion the costs of every action in any manner it thinks fit.

WIJESINGHE *vs.* BAWA.

No. 4,742, C. R., Anuradhapura.

18th August, 1908.

Injunction — Service — Language in which copy should be served—Sec. 55, *Civil Procedure Code.*

Per Wood Renton, J.:—There is no provision in the Civil Procedure Code which, as in the case of a summons to answer a plaint (see sec. 55), makes it necessary that the copy of an injunction served on a defendant should be drawn up in the language of the race to which he belongs.

SINGHO APPU *vs.* AMARASURIYA

No, 17,509, D. C., Kandy.

18th August, 1908.

Partnership—Dissolution—Action for accounting—Oral evidence to establish partnership—Admissibility.

Per Hutchinson, C. J., & Wendt, J.:—Where a partnership in fact existed and has been determined then, in an action to adjust the accounts between the partners, parol evidence is admissible to "establish the partnership", that is, to prove that it existed, if that fact is denied by the defendant.

NADAN *vs.* PERUMAL *et al.*

No. 10,380, P. C., Negombo.

21st August, 1908.

Village tribunal—Jurisdiction—"Petty theft"—Meaning.

Per Wendt, J.:—The Ordinance No. 24 of 1889, sec. 28, does not enact that village tribunals alone shall try all cases of theft of property under Rs. 20 in value, but only "petty thefts" of such property.

GUNEWARDENE *vs.* BABUN.

No. 25,994, P. C., Matara.

24th August, 1908.

Charge—Written report by headman—Procedure—Charge should be in writing—Secs. 148*(b)*, 187(1) *&* (2), *Criminal Procedure Code.*

Per Wood Renton, J.:—Where a case is launched on a written report in terms of sec. 148 (b) of the Criminal Procedure Code it is the duty of the magistrate, in compliance with sec. 187(1) of the Code to frame a charge against the accused.

It is not expressly provided that such a charge must be embodied in writing, but that requirement does follow from the provision in sec. 187 (3) that the magistrate shall read the charge to the accused.

GRAHAM *vs.* ALAGIE

No. 30,783, P. C., Matale.

28th August, 1908.

Security to keep the peace—Sec. 80(1), *Civil Procedure Code.*

Per Wood Renton, J.:—Sec. 80(1) cannot fairly be extended to a case in which there is only a probability of a breach of the peace.

WIJEYSINGHE *vs.* DE SARAM.

No. 25,934, P. C., Matara.

28th August, 1908.

Theft—Removal of prædial products— Bona fide *claim to property.*

Per Wood Renton, J.:—The removal of prædial products from the possession of the complainant, not only without the complainant's consent, but without his knowledge—whatever ultimate right the accused might be declared by a court of law to have in the land in question—amounts to theft, as he had no immediate right to the particular product which he appropriated.

NAWANA *vs.* FERNANDO.

No. 22,662, P. C., (Addtl.), Colombo.

28th August, 1908.

Escape from custody—Escape of person arrested only on suspicion—Charge under sec. 219, *Penal Code.*

Per Wood Renton, J.:—A person who is arrested on suspicion of having committed an offence and escapes can be charged with the offence of having escaped from legal custody under the later portion of sec. 219 of the Penal Code, which attaches a punishment to escape "from any custody in which he is lawfully detained for any such offence".

CORNELIA *vs.* SAMODIS.

No. 22,212, P. C., Matara.

9th September, 1908.

Maintenance—Imprisonment for failure to pay—Powers of magistrate.

Per Wood Renton, J.:—Under sec. 9 of the Maintenance Ordinance (No. 19 of 1889) a magistrate can order imprisonment only in respect of what remains unpaid after the warrant has been executed.

There is nothing in sec. 9 of the Ordinance to prevent a magistrate issuing one warrant for the recovery of more than one month's arrears of maintenance.

SAIBO *vs.* KATIRKAMERTAMBY.

No. 4,144, P. C., Trincomalie.

11th September, 1908.

Game—Shooting during close season —Requisites of proof—Ordinance No. 10 *of* 1891.

Per Wendt, J.:—In a charge of shooting game (as defined in Ordinance No. 10 of 1891) without a licence during the close season, it is essential to prove that the close season had been declared, and also the modes of publication as specified in sec. 13. (P. C., Hambantota, No. 3,586, S. C. M., 18th September, 1905, followed).

DINES *vs.* JAYAWARDENE.

No. 25,311, P. C., Tangalle.

14th September, 1908.

Appeal—Conviction—No sentence— Secs. 335 336 *&* 337, *Criminal Procedure Code.*

Per Wendt, J.:—Where a person is convicted and no sentence is passed, he cannot appeal except with the leave of the Court or upon a point of law. (See secs. 335, 336 & 337, Criminal Procedure Code).

SUPPLEMENT TO THE APPEAL COURT REPORTS.

ABAYAKOON *vs.* DIONIS.

No. 8,615, P. C. (Addtl.), COLOMBO.

14th September, 1908.

Village tribunal—Jurisdiction—Gaming place—Sec. 6 *of Ordinance No.* 24 *of* 1889.

Per WOOD RENTON, J.:—The rule in sec. 6 of Ordinance No. 24 of 1889, gives jurisdiction to a village tribunal only in the case of a passive permission to use a place as a common gaming place.

PALANIAPPA CHETTY *vs.* GOMES *et al.*

No. 3,697, D. C., KALUTARA.

14th September, 1908.

Res Judicata—*Dismissal of action—Sec.* 418, *Civil Procedure Code.*

Per WENDT & WOOD RENTON, JJ.:—The dismissal of an action under sec. 418 of our Code comes within the range of the law of *res judicata* as it exists in Ceylon.

The judgment of dismissal is a "decree", as it finally disposes of the suit (*i.e.*, the plaintiff's right to maintain the action) so long as it remains on record.

Being a "decree" it operates as *res judicata* under sec. 207 of the Civil Procedure Code.

DE ZILVA *vs.* JUAN.

No. 41,994, P. C., GALLE.

26th September, 1908.

Building—Ordinance No. 17 *of* 1887, *sec.* 2—*Prescription—Burden of proof—Sec.* 283 *of Ordinance No.* 17 *of* 1887.

Per WOOD RENTON, J.:—A house does not become a building until it is roofed. When once a house is erected within the meaning of sec. 2 of the Ordinance of 1887, there is a breach of the by-law (Rule 1, chap. 4).

When a plea of prescription is raised under sec. 283 of the Municipal Council's Ordinance, the burden of proof is on the accused.

THEPANIS *vs.* PERERA *et al.*

No. 29,935, P. C., ANURADHAPURA.

26th September, 1908.

Police Magistrate—Office Assistant to the Government—Charge by headman—Competency of the Office Assistant as Police Magistrate to hear the charge.

Where a Police Magistrate, who was also an Office Assistant to the Government Agent, heard a case instituted by a Police Headman, who was a subordinate officer under the Police Magistrate, in his capacity as Office Assistant—

Held, per WOOD RENTON, J.:—That such a case does not come with the purview of the cases of *Rode* v. *Bana* (1. N. L. R. p. 373), *Daniel* v. *Carim Usuff* (1 Tamb. 60), *Perera* v. *Carolis* (1 Tamb. 61), or *Queen* v. *Huggins* (1 Q. B. 563), as the Police Magistrate is only the Office Assistant to the Government Agent, to whom the Headman was subordinate, and in a case in which the acts charged are *male in se* of a very serious character.

GREVE *vs.* CARPEN.

No. 12,358, P. C., COLOMBO.

28th September, 1908.

Master and servant—Notice to quit need not be in writing—Verbal notice sufficient—Sec. 3 *of Ordinance No.* 11 *of* 1865.

Per WOOD RENTON, J.:—It is not necessary under sec 3 of the Labour Ordinance (No. 11 of 1865) that there should be a notice in writing of a servant's intention to terminate a monthly engagement.

A verbal acceptance on the part of a servant to accept his employer's offer of higher wages, and the fact of his continuance in service in consideration of the advance in his wages after the date on which he gave written notice of quitting, are quite sufficient to keep his original contract in force.

GODAGAMA *vs.* MATHES.

No. 31,976, P. C., BALAPITIYA.

29th September, 1908.

Sentence—Accused already undergoing imprisonment—Sentence to commence at expiration of previous sentence—Order to run concurrently irregular—Sec. 321, Criminal Procedure Code.

Per WOOD RENTON, J.:—It is not competent for a magistrate to order that a sentence passed on an offender who is already sentenced for another offence should run concurrently with the previous sentence.

Under sec. 321 of the Criminal Procedure Code such sentence should commence at the expiration of the imprisonment to which he has already been sentenced.

PINTO *vs.* UKKU.

No. 15,913, P. C., KANDY.

30th September, 1908.

Peace officer—Obstruction—Assistance—Sec. 183, Penal Code—Where search should be made.

Where a peacer officer in the execution of a search warrant for fermented toddy called to his assistance peons of the arrack renter, who were obstructed—

Held, per WOOD RENTON, J.:—That in view of the general terms of sec. 183 of the Penal Code it is competent for a peace officer to call to his aid such assistance, and the obstruction caused to the peons was an offence.

Sec. 59 of the Ordinance No. 10 of 1844, authorizes a peace officer to search for fermented toddy in any place where he has reason to believe fermenated toddy is.

SINGER MFG. Co., LTD. *vs.* PERERA.

No. 6,279, P. C., HATTON.

13th October, 1908.

Per WENDT & WOOD RENTON, JJ. (HUTCHINSON, C. J., agreeing, though not hearing the argument):—A petition of appeal by a complainant signed by his proctor only is in order. No proxy is required in a criminal case, and District Court proctors are qualified to sign petitions of appeal.

RANGMENIK *vs.* GANGAWATE KORALE *et al.*

No. 2,349, D. C., KANDY.

14th October, 1908.

Appeal—Non-joinder of necessary party—Objection—Sec. 756, Civil Procedure Code.

Per WENDT, J.:—The fact that a necessary party is not named in the appeal and that no notice of the appeal was served on him is not fatal to the appeal under sec. 756 of the Civil Procedure Code. Such objection being one for lack of parties, it can be remedied by sending the case back for the purpose.

SUPPLEMENT TO THE APPEAL COURT REPORTS.

FERNANDO *vs.* MARIKAR.

No. 4,187, C. R., Colombo.

4th June, 1908.

Proctor—"Incapacity to act"—Temporary absence from the Island—Civil Procedure Code, sec. 27.

Per Wood Renton, J. :—It is quite clear that sec. 27 of the Civil Procedure Code primarily contemplates an "incapacity to act" *ejusdem generis* with the disqualifications which immediately precede it.

Absence, which for the purposes of protracted litigation would only be treated as temporary, might be, from the point of view of a simple case of which the Courts ought to dispose in a few months, a permanent absence; and under such circumstances it ought to be open to the client to satisfy the Court that the absence of his Proctor belongs to this category.

THE KING *vs.* DIAS.

No. 1,930, D. C. (Cr.), Kalutara.

1st July, 1908.

District Court—Criminal jurisdiction—Penal Code, sec. 68—Criminal Procedure Code, sec. 14.

Per Hutchinson, C. J., & Wood Renton, J.:—Sec. 68 of the Ceylon Penal Code does not enable a District Court to impose a sentence of imprisonment in excess of the ordinary 2 years' limit, to which its jurisdiction is confined by sec. 14 of the Criminal Procedure Code, even though there are previous convictions against the accused.

TILAKERATNE *vs.* WIJESINGHA.

No. 5,046, C. R., Anuradhapura.

2nd July, 1908.

Proctor—Appointment—Proxy—Omission of client to sign before institution of legal proceedings—Subsequent ratification.

Per Hutchinson, C. J.:—Sec. 27 of the Civil Procedure Code, which enacts that "the appointment of a proctor to make any appearance or application or do any act as aforesaid shall be in writing by the client and shall be filed in Court", is only directory.

The enactment no doubt means that the appointment is to be signed and filed before the Proctor does anything in the action; but if the omission to sign is not because the proctor has not in fact any authority, and if the client afterwards ratifies what has been done in his name by signing the authority, that satisfies the requirements of the enactment.

PERUMAL CHETTY *vs.* GONETILEKE.

No. 7,522, C. R., Colombo.

10th July, 1908.

Trial—Appearance of Proctor—Application for postponement—Refusal—Subsequent proceedings—Civil Procedure Code, sec. 823.

Per Hutchinson, C. J.:—Where a proctor appears for his client and asks for a postponement, which the judge refuses, it is not competent for the Court to give judgment for plaintiff under sec. 823 of the Civil Procedure Codes without trial.

COSTA *vs.* FERNANDO *et al.*

No. 9,090, C. R., Negombo.

14th July, 1908.

Action under sec. 247 *of the Civil Pro-*

cedure Code—Joinder of debtor as defendant—Prescriptive possession.

Per HUTCHINSON, C. J.:—A judgment-debtor may be joined as a plaintiff in an action under sec. 247.

In an action under sec 247 of the Civil Procedure Code the judgment-debtor can be joined as a party defendant.

Proof of such possession as is mentioned in sec. 3 of Ordinance No. 22 of 1871 by the plaintiff or his debtor under whom he claims will entitle the plaintiff to a decree in his favour.

MARIKAR *vs.* CAFFOOR.

No. 3,594, D. C., KALUTARA.

21st July, 1908.

Interim *injunction—Damages—Liability of applicant.*

Per HUTCHINSON, C. J., & WENDT, J.:—An *interim* injunction should never be granted *ex parte* or on notice without an undertaking as to damages.

In the absence of such an undertaking, and of proof that the applicant acted maliciously, he is not liable for any damage which the other party suffered in consequence of the injunction.

THE KING *vs.* PODI SINGHO.

No. 1,993, D. C. (Cr.), COLOMBO.

27th July, 1908.

Robbery, charge of—Conviction for theft—Criminal Procedure Code, sec. 183—*Ceylon Penal Code, secs.* 367 *&* 380.

Per WENDT, J.:—It is competent for a Court upon an indictment of robbery to convict an accused of theft.

BABAI HAMY *vs.* MARCINA HAMY *et al.*

No. 8,009, D. C., GALLE.

27th July, 1908.

Donation—Minor—Acceptance—Fidei commisum—*Right of survivorship.*

Per HUTCHINSON, C. J., & WENDT, J.:—A minor can accept a donation made in his favour.

Where a deed of donation creates a single *fidei commissum* it follows that so long as a descendant of any one of the donees exists he is entitled to the possession of the whole property as against an alienee of the donees.

Tillekeratne v. *Abeyesakera* (2 N. L. R. p. 313) followed.

THE ATTORNEY-GENERAL *vs.* PONNIAH.

No. 2,457, D. C., BATTICALOA.

13th August, 1908.

Execution of writ—Re-issue—Power of Court—Fiscal's return to writ—Deposit of subsistence allowance—Release of debtor—Opening of outer door of dwelling house—Effect of these provisions in regard to Crown—Civil Procedure Code, secs. 298, 300, 311, 318, 366 *&* 371.

Per HUTCHINSON, C. J., & WOOD RENTON, J.:—There is nothing in the Civil Procedure Code to prevent a judge from extending the time for the return of a writ of execution against person.

It is not essential that the exact words of sec. 298 should be followed in the Fiscal's return. A return that "all the available properties have been seized and sold" is sufficient.

The provision in sec. 371 is only directory; and where a return is made

without being sworn to, the defect could be subsequently remedied.

Sec. 366 is by its own terms limited to civil process issued at the suit of a private individual.

Sec. 313, providing for the deposit of subsistence money before arrest, does not bind the Crown.

The provisions in secs. 300 and 311 regarding the release of a debtor binds the Crown.

KIRIWANTE *vs.* SIRIBADDANA *et al.*

No. 26,688, C. R., BADULLA-HALDUMULLA.

18th August, 1908.

Action under sec 247 *of the Civil Procedure Code – Competency of judgment-debtor to bring an action—"Party against whom an order is made" – Civil Procedure Code, secs.* 244, 245 *&* 246—*Right debtor to sue for ejectment and declaration.*

Per HUTCHINSON, C. J.:—A judgment-debtor is not a party within the meaning of secs. 244-246 of the Civil Procedure Code, against whom an order on the claim inquiry is made, and cannot, therefore, maintain an action under sec. 247 of the Code.

The debtor, however, has his ordinary remedy by action against the persons in possession, either to eject them or for a declaration of his title.

JOSIN NONA *et al. vs.* BATIN NONA *et al.*

No. 3,288, D. C., KURUNEGALLE.

21st August, 1908.

Kandyan Law—Acquired property—Interest of widow.

Per WOOD RENTON, J.:—A Kandyan widow is entitled to a life interest in the entirety of her deceased husband's acquired property. The fact that such property was acquired during the first marriage does not limit her right to a half share.

ANDRIS *vs.* DE SILVA.

No, 4,165, D. C., MATARA.

26th August, 1908.

Prescription—Co-owners—Interruption of prescription by one of several co-owners.

Per HUTCHINSON, C. J. & WOOD RENTON, J.:—Interruption by one of several co-owners of a party pleading prescription does not enure to the benefit of all the co-owners.

Dictum of Dias, J., in *re* Gunasakera (1 S. C. R. p. 64) disapproved.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF SULTAN UMMA.

No. 2,842, D. C., COLOMBO.

31st August, 1908.

Last will—Signature of testatrix.

Where the signature of a testatrix—an attested mark—was at the end of the will in a blank space opposite to the attestation clause,

Held, per WENDT & WOOD RENTON, JJ.:—That the will was duly signed.

It is sufficient if the signature is so placed that it is apparent on the face of the will that the testator intended to give effect by such signature to the writing signed as his will.

MOHAMED BHOY *et al. vs.* DIAS *et al.*

No. 25,576, D. C., COLOMBO.

9th September, 1908.

Partition action—Agreement to sell

share to be allotted by final decree—Moveable property—Bill of sale—Registration.

Where D., pending a partition suit, entered into an agreement with B. agreeing to sell to B. the share of the land or of the proceeds sale which would be allotted to him by the final decree,

Held, per WENDT & WOOD RENTON, JJ.:—That the agreement was not a "bill of sale", because the subject of it was not "moveable property", and did not stand in need of registration under the provisions of Ordinance No. 8 of 1871.

ATTORNEY-GENERAL *vs.* PERERA.

No. 24,032, D. C., COLOMBO.

15th September, 1908.

Writ of execution—Issue pending appeal to the Privy Council—Application to stay.

Where the defendant applied to the Supreme Court to stay the execution of a writ pending his appeal to the Privy Council,

Held, per WENDT & WOOD RENTON, JJ.:—That the application should have been made before the District Court.

ABUBAKKER LEBBE *vs.* APONSU *et al.*

No. 17,919, D. C., KANDY.

22nd September, 1908.

Execution of decree—Resistance—Proof of hindrance—Burden of proving title—Civil Procedure Code, secs. 325, 327 & 377 (1)—Interlocutory order—No appeal from—Effect.

Per WENDT & WOOD RENTON, JJ.:—That the remedy by way of petition under sec. 325 of the Civil Procedure Code is open to a judgment-creditor to whom the Fiscal has only been able to give constructive possession under sec. 324.

Where there are (1) a distinct allegation that the respondent had been prevented from taking complete and effectual possession of the property adjudged to him by some adverse parties at the instigation of the defendant, (2) an assertion by the persons opposing possession of an adverse claim to possession, and (3) an avowal by the defendant that he had granted the lease on which that adverse claim was based,

Held: That these facts constituted quite a sufficient allegation and proof of hindrance to satisfy sec. 325 of the Code.

Before any investigation under sec. 237 is ordered it is for the obstructor to satisfy the Court that he is a *bona fide* claimant. But when once the obstructor has satisfied that Court on that point, the application of sec. 377 (b) has exhausted itself, and the initial and ultimate burden of proving title or possession, as the case may be, is on the decree-holder.

Where an interlocutory order is made, which goes to the very root of the proceedings, the fact that it is not appealed against at once may fairly be regarded by an appellate tribunal, before which it is challenged on a final appeal, as evidence of acquiescence in it on the part of the appellant.

HARMANIS *vs.* CARLINA *et al.*

No. 3,589, D. C., KALUTARA.

25th September, 1908.

Breach of promise of marriage—Failure of action—Recovery of expenses.

Per WENDT, J., & GRENIER, A. J.:—Where the plaintiff failed in an action for breach of promise of marriage as

there was no written promise of marriage, he could not recover the expenses he was put to in preparing for the marriage.

PERERA *et al. vs.* FERNANDO.

No. 3,656, D. C., CHILAW.

28th September, 1908

Joinder of parties—Civil Procedure Code, sec. 18.

Per WENDT & WOOD RENTON, JJ.:—That the reason for the power which sec. 18 of the Civil Procedure Code vests in the Court is to avoid a multiplicity of actions and to reduce the costs of litigation by providing a means whereby one trial shall conclude ("settle") the matter in regard to all parties interested.

KOUNA HAMI *vs.* JAYASURIA.

No. 5,261, P. C., TANGALLE.

28th September, 1908.

Landlord and tenant-Improvements effected by tenant—Right of tacit hypothec.

In an action for rent the tenant alleged that he had, with his landlord's consent on his landlord's undertaking to compensate him, effected certain useful improvements.

Held, per WENDT, J.:—That the tenant has a right to contend that he had a tacit hypothec on the property in virtue of the improvements.

SEGU MOHAMADO *vs.* GOVINDEN.

No. 26,674, C. R., BADULLA-HALDUMULLA.

30th September, 1908.

Power of attorney—Power to act during absence of principal—Act done by agent during residence of principal.

The power of attorney granted by the plaintiff, in whose name the action was brought, to M. L. was in terms a power subsisting only during the principal's absence. It was proved, however, that, at the time M. L. signed the proxy in favour of his proctor his principal was actually resident in Ceylon,

Held, per WOOD RENTON, J.:—That in view of the terms of sec. 25 (b) of the Civil Procedure Code, and of the cases of *Alia Marikar* v. *Pathu Muttu et al.* [(1900) 2 Br. p. 64], and *Bisandas Valad Majuiram* v. *Lakhimchand Kisanchand* [(1869) Bom. H. C. Reports p. 159] the signature of the proxy in question by the *quondam* general attorney was bad.

SENARATNE *vs.* CHARLES *et al.*

No. 9,052, P. C., KALUTARA.

3rd October, 1908.

Trespass—Intent to seduce coolies—Offence under sec. 19 *of Ordinance No.* 11 *of* 1865—*Penal Code, sec.* 48.

Per GRENIER, J.:—The offence of criminal trespass with intent to seduce a person from his contract of service cannot be brought under sec. 38 of the Penal Code, because the offence of seduction under sec. 19 of the Ordinance 11 of 1865 is punishable only with three months' rigorous imprisonment, and it cannot, therefore, come within the operation of the clause with intent to committ an offence as defined in sec. 43 of the Penal Code.

GOONEWARDENE *vs.* PERERA *et al.*

No. 3,616, D. C., KALUTARA.

5th October, 1908.

Beaching fishing-boats—Right to beach on private land—Servitude—User.

Per WENDT, J., & GRENIER, A. J.:—That the right of beaching fishing-boats on private land is not a praedial or a personal servitude. It could form the subject of public right, but there must be evidence of immemorial user.

ATTORNEY-GENERAL *vs.* LOUIS HAMY.

No. 9,213, C. R., GALLE.

5th October, 1908.

Toll—Sale of right to levy—Right of Government to exempt passengers.

Where Government had sold the exclusive right of levying and recovering toll,

Held, per WOOD RENTON, J.:—That Government had no right in a contract with a coach proprietor for carrying the mails to stipulate so as to entitle him to carry passengers past the toll free from levy.

FERNANDO *et al. vs.* FERNANDO.

No. 6,910, D. C., NEGOMBO.

6th October, 1908.

Prescription—Overt act—Nature.

Per WENDT, J., & GRENIER, A. J.:—That an overt act, from which prescriptive possession may begin may be done in several ways, and not necessarily by any physical evidence or positive aggression.

DARLEY BUTLER & Co. *vs.* DE SILVA.

No. 25,854, D. C., COLOMBO.

13th October, 1908.

Bill of sale—Moveable property—Ordinance No. 8 *of* 1871—*"Future goods"—Sale of Goods Ordinance,* 1896.

Per WENDT, J., & GRENIER, A. J.:—That it is perfectly clear from the terms of Ordinance No. 8 of 1871 that the moveable property contemplated by it must be definite and certain, so that it should be capable of being described and identified in a manner that would render the registration effectual, which is the object of the Ordinance.

If the property dealt with by the instrument in question is "future goods" within the meaning of the Sale of Goods Ordinance, 1896—that is to say goods to be manufactured or acquired by the seller after the making of the contract—then the instrument would not be a "bill of sale" within the purview of the Ordinance of 1871.

SILVA *vs.* FERNANDO.

No. 594, C. R., KALUTARA.

15th October, 1908.

Evidence—Production of records in evidence.

Per GRENIER, A. J.:—It is highly irregular to tender records in evidence without reference to specific portions of them, which ought to be distinctly identified and marked.

JAYAWARDENE *vs.* ISI LEBBE.

No. 9,715, C. R., RATNAPURA.

16th October, 1908.

Prescription—Claim for work done by an elephant—Ordinance No. 22 *of* 1871, *secs.* 9 *&* 11.

Per GRENIER, A. J.:—A claim for hire for work done by an elephant is governed by sec. 11, and not by sec. 9 of the Ordinance No. 22 of 1871.

Sec. 9 clearly contemplates manual labour.

SUPPLEMENT TO THE APPEAL COURT REPORTS.

BANDA *et al. vs.* BANDA.

No. 5,119, C. R., Anuradhapura.

16th October, 1908.

Co-owners—Action by one on behalf of the other co-owners—Where some of the plaintiffs have no interest in the land Dismissal—Regularity of procedure.

Per Grenier, A. J.:—Where several persons jointly instituted an action after permission under sec. 16 of the Civil Procedure Code for themselves and onbehalf of their co-owners, and it is discovered at the trial that some of them had no interest in the land in claim, the action should not be dismissed, but the names of the person not interested should be struck off and the remaining plaintiffs should be permitted to go on, if they so desire, with the addition of other parties as may be found to be interested.

FERNANDO *vs.* EASSIN.

No. 8,586 P. C., (Addtl.) Colombo.

17th October, 1908.

Maintenance—Residence—Jurisdiction—Ordinance No. 19 of 1889.

Per Wendt, J.:—In an application of a wife against her husband for maintenance, the offence (if any) is committed at the place of his residence, and therefore the Court of the district to which the wife had removed cannot take cognisance of it.

In the case of a man who neglects to maintain his illegitmate child, the Court having jurisdiction is the Court of the place where the putative father's obligation had to be fulfilled, viz., at the place of residence of the child.

THIAGARAJAH *vs.* PILLAI *et al.*

No. 1,798, D, C., Jaffna.

20th October, 1908.

Thesavalamai—*Succession.*

Where a girl died leaving property inherited by her from her mother, and no brother or sister surviving her,

Held, per Wendt, Wood Renton, JJ., & Grenier, A. J.:—That the next of kin of the deceased's mother was entitled to succeed to the exclusion of the father.

FONSEKA *et al. vs.* NONA.

No. 8,538, D, C., Galle.

20th October, 1908.

*Joint will—Interpretation—*Fidei commissum.

A joint will stated: "After one of us has died, except that the survivor may possess as he pleases the produce derived from our estate, we have prohibited the person who may survive after the death of one of us from making any disposition whatever according to his single will of the moveable and immoveable property belonging to our estate.

"After the death of us both if there be any moveable or immoveable property which has remained over after providing our maintenance, one just half of all that may be divided and taken by the heirs in blood of G., and the remaining half by the heirs in blood of C..........."

Held. per Wendt, J., & Grenier, A. J.:—That the intention of the testator and testatrix was that the survivor was to have only a life interest in the property, and not the *dominium* and the power of alienation.

FERNANDO *vs.* PERERA *et al.*

No. 15,971, C. R., Negombo.

21st October, 1908.

*Destruction by fire—*Onus *of proof.*

Per Wood Renton, J.:—The *onus* of proving that the fire which caused

damage to plaintiff's honse during the tenancy of the defendant was not through his fault, was on the defendant.

Kulatungam v. *Sapapathipillai et al.* (S. C. M. October 6, 1908) followed.

ISMAIL LEBBE *vs.* GUSTAN APPU.

No. 3,455, P. C., AVISAWELLA.

23rd October, 1908.

Previous conviction – Summary jurisdiction of Police Magistrate—Ordinance No. 7 *of* 1899, *sec.* 6.

Per WENDT, J.:—Sec. 6 of Ordinance No. 7 of 1869 deprives a police magistrate of summary jurisdiction in the event only of its "appearing" to him that the circumstances mentioned in the section existed.

Where a magistrate was not aware that an accnsed being summarily tried before him had several previous convictions, and their relative punishments were such as to bring the accused within the provisious of sec. 6, but believed that they were not, and on that belief tried the accnsed snmmarily,

Held: That the Magistrate had acted with jurisdiction.

COREA *vs.* GIRIGORIS.

(*In Revision*).

No. 10,203, P. C., NEGOMBO.

23rd October, 1908.

Supreme Court, powers of—Power to increase amount or nature of punishment—Criminal Procedure Code, secs. 356 *&* 357.

Per WENDT, J.:—Secs. 356 and 357 of the Criminal Procedure Code confers on the Supreme Court the power in revision of increasing the amonnt or nature of the punishment passed by any Court.

A distinction must, however, be drawn between the case of an acquittal and that of a conviction with an inadequate sentence, and also between the sentence of a District Court, in which the Attorney-General directly prosecutes by one of his officers and that of a Police Court, of which the Attorney-General has not as a rule any direct cognisance.

RODRIGO *et al. vs.* GREGORIS *et al.*

No. 8,830, C. R., COLOMBO.

23rd October, 1908.

Jurisdiction—Court of Requests—Gansabawa.

The plaintiff claimed Rs. 75; the Commissioner fonnd that he was entitled to Rs. 10 only, and dismissed the action on the ground that he had no jurisdiction, and referred the parties to the Gansabawa,

Held, per GRENIER, A. J.:—That the dismissal of the action was wrong, and that the Commissioner ought to have entered judgment for Rs. 10 and pnnished the plaintiff in costs.

PEDRO APPUHAMY *vs.* SILVA.

No. 8,701, P. C., KALUTARA.

24th October, 1908.

Arrack—Unlawful possession—Sec. 32 *of Ordinance No.* 10 *of* 1844.

Per WENDT, J.:—The possession of a quantity of arrack not exceeding two qnarts is not "nnlawful possession of arrack" within the meaning of sec. 32 of Ordinance No. 10 of 1844.

De Silva v. *Shona* [(1876) Ram. 1872-76, p. 315]; P. C., Galle, No. 19,033, Civ. Min., 21st Jannary, 1903; and *James Appu* v. *Carolis* [(1904) 8 N. L. R. p. 116] followed.

SUPPLEMENT TO THE APPEAL COURT REPORTS.

THE KING *vs.* BOOVA *et al.*

No. 1,916, D. C. (Cr.), Kandy.

28th October, 1908.

Criminal trial—Commitment to District Court on indictment—Regularity of proceedings in lower court—District Court cannot question regularity of committal.

Per Wendt, J.:—A District Court, before which an accused person is brought for trial upon a warrant of committment regular on its face, and to which an indictment is presented by the Attorney-General, is not competent to enquire whether the proceedings which culminated in the committal were regularly instituted or conducted. It is its duty to try the accused.

The Queen v. *Kolandaivel* [(1891) 1 S. C. R. p. 198] followed.

Vide Attorney-General v. *Appuwa Veda* [(1907) 10 N. L. R. p. 199].

In *The King* v. *Haramanis* [(1903) 8 N. L. R. p. 138] the point was not considered.

MACKIE *vs.* FERNANDO.

No. 7,585, C. R., Colombo.

29th October, 1908.

Contract of sale—Acceptance—Sale of Goods Ordinance, No. 11 of 1896, sec. 4.

Per Grenier, A. J.:—The Sale of Goods Ordinance provides for two kinds of acceptances: the first, where the buyer actually receives a part of the goods, having accepted the same; the second, where the buyer accepts the goods in a legal sense by doing some act in relation to them by which he recognizes a pre-existing contract of sale independent of there being an acceptance or not in performance of the contract.

DINESA *et al. vs.* BAISO.

No. 8,578, C. R., Ratnapura.

5th November, 1908.

Kandyan Law—Adoption—Evidence.

Per Grenier, A. J.:—The fact that in an alleged adopted (under the Kandyan Laws) child's marriage certificate the name of the alleged foster father, is given as the name of the father cannot be regarded as a public declaration of the adoption.

In the matter of the insolvency of GAFFOOR.

No. 1,562, D. C., Kandy.

5th November, 1908.

Insolvency—Adjudication of debtor in custody—Release—Detaining creditor's right to be heard.

Per Wendt, J., & Grenier, A. J.:—That a debtor in custody is not entitled as a matter of course to a discharge upon adjudication. The detaining creditor should have notice of any application for discharge, and is entitled to be heard.

SENANAYAKE *et al. vs.* DISANAYAKE *et al.*

No. 18,482, D. C., Kandy.

10th November, 1908.

*Deed—Interpretation—*Fidei commissum.

By a deed D. J. "made over" certain property to his two children L. and K. "in the manner hereinafter mentioned that is to say: it is determined that the said two children L. and K., their children and grandchildren from generation to generation, can from

this day henceforth possess only the said land, but they cannot sell or mortgage the same; and that D. M., the mother of the said two children, can during her lifetime possess the said land."

Held, per HUTCHINSON, C. J., & GRENIER, A. J.:—That the deed gave only a life interest to L. and K. with a *fidei commissum* in favour of their children and grandchildren.

Also: It is not essential that a deed should state that the gift was accepted.

MACK *vs.* ATTORNEY-GENERAL.

No. 8,787, C. R., COLOMBO.

11th November, 1908.

Action for goods lost through negligence—Ceylon Government Railwyas —Onus of proving negligence.

Where the action was one to recover the value of a padlock which was used to secure a trunk forming part of the plaintiff's luggage as a passenger on the Ceylon Government Railways alleged to be lost through the neligence and default of the agents and servants of the Ceylon Government,

Held, per WENDT, J.:—That the plaintiff had in the first instance to establish such negligence or misconduct.

THE KING *vs.* FERNANDO.

No. 1,899, D. C, (Cr.), KANDY.

13th November, 1908.

Criminal misappropriation—Appropriation of money out of several sums—Charge—One offence—Tender of witnesses on the indictment—Practice.

Where the accused was paid a sum of money by three different persons and in three different amounts, paid at the same time, and he was charged with having accounted for only a portion of the money so received and misappropriated the balance, it was objected that this was a charge of three separate offences, a separate offence in respect of each of the three sums paid to him,

Held, per HUTCHINSON, C. J.:—That the misappropriation is one offence, and not several.

Also: That the practice of the Court requiring the prosecution to tender for cross-examination any witness whose name is on the indictment, if the defence wishes to do so, has not been uniform in Ceylon, and there is no law prescribing it, although it seems to be right.

GOONETILLEKE *vs.* MAM NEINA.

No. 28,944, P. C., PANADURA.

16th November, 1908.

Pawnbroker—Ordinance No. 8 of 1893—Articles left as security for goods purchased—Not an act against the Ordinance.

Per HUTCHINSON, C. J.:—The fact that a person sold goods to customers and took certain articles from them as security for the price of the goods and on the terms that they could be redeemed on payment of the price does not amount to the offence of having acted as a pawnbroker without a license under sec. 24 of the Ordinance No. 8 of 1893, as there was no money "paid or advanced or lent" on the security of the articles.

SOURJAH *vs.* FERNANDO.

No. 4,089, M. C., COLOMBO.

16th November, 1908.

*Trespass—*Bona fide *claim to land—*

SUPPLEMENT TO THE APPEAL COURT REPORTS.

Magistrate has no jurisdiction—Acquittal.

HUTCHINSON, C. J.:—Where a man is brought before a magistrate's court charged with trespass as a criminal offence, and sets up in good faith a right to the land on which he is charged with trespassing, the magistrate has no jurisdiction to try the question of title raised; for the fact that the claim is made in good faith entitles the defendant to be acquitted, even though the claim may be afterwards found to have been mistaken. Nor does it matter if the decision on the claim is found to turn ultimately in part or in the whole on a point of law, as for example on the construction of a will or a deed, for the mistake is a mistake of fact, as to whether or not he is the owner of the land.

THE KING *vs.* NAGAMANY.

No. 226, D. C. (Cr.), JAFFNA.

30th November, 1908.

False evidence—Requisites of proof.

HUTCHINSON, C. J.:—In a charge of giving false evidence on the ground that the accused had denied having been sent to jail for 12 months for stabbing it is not sufficient to produce the man who was supposed to have been stabbed.

The record of the case must be produced and the accused must be identified as the person named in it.

DINGIHAMY *vs.* JANIS APPU.

No. 26,383, P. C., MATARA.

4th Deeember, 1908.

Magistrate—Successor—Prejudice to accused—Sec. 292, Criminal Procedure Code.

Where one magistrate records some evidence and postponed the case and on that day another magistrate recorded further evidence and convicted the accused,

Held, per HUTCHINSON, C. J.:—That sec. 292 of the Criminal Procedure Code applied to such a case.

The words "succeeded by another magistrate who has and who exercises such jurisdiction" mean succeeded in the hearing of the case by another magistrate who has and who exercises jurisdiction in the hearing.

KERAMEN *et al. vs.* MARKAR.

9th December, 1908.

No. 2,928, D. C., BATTICALOA.

Procedure—Where case has been closed—Right to adduce further evidence—Civil Procedure Code, secs. 184, 134 & 166.

Per HUTCHINSON, C. J., & GRENIER, A. J.:—When the parties to a civil action have placed before the court all the evidence which they can or which they think desirable and have closed their case and have addressed the court, the ordinary course is for the court to give judgment in accordance with sec. 184 of the Civil Procedure Code. The court might under special circumstances reopen the case after it had been closed and call for further evidence. Secs. 134 and 166 might allow it. But in all ordinary cases the court should give judgment on the materials put before it by the parties and such other evidence as the court may require before the case is closed.

PEIRIS *vs.* SUBASINGHE.

No. 42,889, P. C., GALLE.

15th December, 1908.

Arrack—Removal—Ordinance No. 10 of 1844, sec. 14.

Per HUTCHINSON, C. J.:—Where a man takes liquor from his store and

removes it or gets it removed to some other place, whatever the purpose may be to which he applies it—whether for sale or for his own consumption or for that of his friends—he "disposes of it" in the ordinary sense of the words, and his act is one which the Ordinance (No. 10 of 1844 sec. 14) meant to prohibit and has prohibited.

THE KING *vs.* FERNANDO.

No. 2,914, D. C., (Cr.) CHILAW.

15th December, 1908.

Confession—Admissibility—Confession by one of several co-accused.

Per HUTCHINSON, C. J.:—The confession of one of several accused is admissible against the other accused, and ought not to be rejected because it indirectly helped to secure the conviction of the person making the confession.

FERNANDO *et al. vs* HETU ETANA.

No. 2,780, D. C., CHILAW.

17th December, 1908.

Execution of decree—Resistance—Procedure—Judgment-debtor.

Per HUTCHINSON, C. J., & GRENIER, A. J.:—The judgment-debtor must be made a respondent to a petition under secs. 325 and 326 of the Civil Procedure Code.

CEYLON LAND & PRODUCE COMPANY *vs.* SENEVIRATNE.

No. 17,575, D. C., KANDY.

23rd December, 1909.

Slander of title—Action—Civil Procedure Code, sec. 5—Action quia timet *When it lies—Requisites—English Law.*

The owner sold to the plaintiff certain land on 11th May, 1897, who registered the sale on 7th June, 1897. On 11th August, 1902, the land was sold under a money decree against the vendor and was purchased by a third party who was in possession. Subsequently the defendant took a mortgage of the same land on 11th July, 1902 and registered it the same day.

Held, per HUTCHINSON, C.J., & WOOD RENTON, J.:—That the acceptance and registration of the mortgage by the defendant is a "denial of a right" belonging to and "the infliction of on affirmative injury" upon the plaintiffs within the meaning of the definition of "cause of action" in sec. 5 of the Civil Procedure Code.

Also: In the absence of proof of special damage an action for slander of title cannot be maintained, but an action *quia timet* lies.

Where title to and the possession of land are in dispute, failure to prove ouster is not failure of the cause of action.

Phear, C. J. in *Fernando vs. Silva,* (1 S. C. C. 28) could not have meant to hold that under no other circumstances would an action *quia timet* lie in Ceylon.

The necessary ingredients of action *quia timet* are:—(*a*) actual or imminent injury; (*b*) prospective damage of a substantial, if not irreparable, kind.

While proof of the necessary ingredients should be insisted on, as the English Courts do, actions *quia timet* should not be assigned a more restricted sphere in Ceylon.

INDEX.

Abatement—

—Order *ex mero motu*—Effect—Partition action—Sec. 402, Civil Procedure Code
ALLAHAKOON v. WICKREMESINGHE .. 8

Absence of Defendant—

—Court of Requests—Default to file answer—Ordinance No. 12 of 1895, sec. 8, sub-secs. 2 & 3
KIRIBANDA *et al.* v. DINGIRI MENIKA .. 42

Absence from Island—

See PROCTOR (2)

Acceptance—

—(1)
See CONTRACT OF SALE

—(2)
See DONATION

Access—

See INTESTATE SUCCESSION

Accident—

See FIRE (1)

Accounting—

—Action for
See PARTNERSHIP

Acquired Property—

—(1)
See KANDYAN LAW (1)

—(2)
See KANDYAN LAW (2)

Acquittal—

See TRESPASS (2)

Action—

—(1)For return of purchase money
See VENDOR & VENDEE

—(2)For declaration of title
See *Res Judicata* (2)

—(3)For mesne profits
See *Res Judicata* (2)

—(4)For recovery of earnest money
See CONTRACT

—(5)Under sec. 247, Civil Procedure Code
See FISCAL'S TRANSFER (2)

—(6)Under sec. 247 of the Civil Procedure Code—Execution of mortgage decree—Claim by purchaser—Subsequent action by decree-holder—Joinder of mortgagor as party defendant—Civil Procedure Code, sec. 640
WALLIAMMA *et al.* v. MUTTU NADAN .. 113

Action—(*contd.*)
—(7)Under sec. 247 of the Civil Procedure Code—Joinder of debtor as defendant—Prescriptive possession
COSTA v. FERNANDO *et al.* .. .. .. ix.
—(8)Under sec. 247 of the Civil Procedure Code—Competency of judgment-debtor to bring an action—"Party against whom an order is made"—Civil Procedure Code, secs. 244, 245 & 246—Right of debtor to sue for ejectment and declaration
KIRIWANTE v. SIRIBADDANA *et al.* .. .. xi.
—(9)For damages—Liability of heirs of deceased tort feasor
SWARIS v. PIERIS *et al.* 155
—(10)To set aside deed of gift
See DEED OF GIFT (4)
—(11)For Partition
See PARTITION ACTION (1), (2), (3), & (4)
—(12)For Accounting
See PARTNERSHIP
—(13)Dismissal of
See Res Judicata (3)
—(14)By Co-Owners
See CO-OWNERS (1)
—(15)For goods lost through negligence—Ceylon Government Railways—*Onus* of proving negligence
MACK v. ATTORNEY-GENERAL .. xviii.
—(16)
See SLANDER OF TITLE
—(17)*Quia timet*
See SLANDER OF TITLE
—(18)On Mortgage Bond
See MORTGAGE BOND

Admissibility—
—(1)Of Evidence of husband
See INTESTATE SUCCESSION
—(2)Of evidence
See PARTNERSHIP
—(3)Of Treatises
See SURVEYOR
—(4)Of Confession
See CONFESSION
—(5)Of Oral Evidence
See CONTRACT

Admission of Guilt—
—Unqualified admission—Criminal Procedure Code, sec. 188
BANDA v. RAMASAMY .. .. .. ii.

Adoption—
See KANDYAN LAW (3)

Adulterine Bastards—
See INTESTATE SUCCESSION

Agreement to Sell—
—(1)Contract by married woman—Written consent of husband—Money paid on such an agreement—Recovery—Period of prescription—*Mala fide* possession
See MARTHELIS APPU v. JAYAWARDENE *et al.* .. 17
—(2)
See CONTRACT
—(3)
See PARTITION (2)

Annual Value—

—(1) Municipal Councils' Ordinance No. 5 of 1867—Assessment of leased premises
ABDUL RAHIMAN v. THE COL. MUNICIPAL COUNCIL 26

—(2)
See ASSESSMENT (2)

Answer—

—Default to file
See ABSENCE OF DEFENDANT

Appeal—

—(1) Leave to
See ASSESSMENT (1)

—(2)
See JURISDICTION (4)

—(3) Conviction—No sentence—Secs. 335, 336 & 337 Criminal Procedure Code
DINES v. JAYAWARDENE .. .. vi.

—(4) Non-joinder of necessary party—Objection—Sec. 756, Civil Procedure Code
RANGMENIK v. GANGAWATE KORALE *et al.* .. viii.

—(5) Petition—Proxy in criminal case—Signature of Proctor
SINGER MANUFACTURING CO. v. PERERA .. viii.

—(6)
See WRIT (6)

—(7)
See ISSUE

Application—

—(1) To certify payment
See WRIT (3)

—(2) To set aside decree
See SUMMONS

—(3) For postponement
See TRIAL (1)

—(4) To stay writ
See WRIT (6)

Apportionment—

—Of costs
See COSTS (2)

Arrack—

—(1) Ordinance No. 10 of 1844, secs. 46, 51 & 59—Peace Officer—Power to seize fermented toddy
WICKREMESINGHE v. BATTA .. .. ii.

—(2) Removal—Ordinance No. 10 of 1844, sec. 14
PEIRIS v. SUBASINGHE .. xix.

—(3) Unlawful possession—Sec. 32 of Ordinance No. 10 of 1844
PEDRO APPUHAMY v. SILVA .. .. xvi.

Assessment—

—(1) Proceedings for reduction—Court of Requests—Leave to appeal—Ordinance No. 7 of 1887, sec. 7—Ordinance No. 5 of 1867, sec. 5—Civil Procedure Code, secs. 5 & 6—Court of Requests Ordinance (No. 12 of 1895) sec. 13 (1)
JALALDEEN v. THE COLOMBO MUNICIPAL COUNCIL 131

—(2)Annual value—Lease—Vacancy of house—Ordinance No. 7 of 1887
LADY DE SOYSA v. THE MUNICIPAL COUNCIL OF COLOMBO 149
—(3)Proceedings for reduction—Jurisdiction—Court of Requests—Ordinance No. 5 of 1867, sec. 1; and Ordinance No. 12 of 1895, sec. 4
BELL v. THE COLOMBO MUNICIPAL COUNCIL .. 27
—(4)
See ANNUAL VALUE (1)

Beaching Fishing Boats—

—Right to beach on private land—Servitude—User
GOOOEWARDENE v. PERERA *et al.* .. .. xiii.

Bicycle—

—Hire of
See LETTING & HIRING

Bill of Sale—

—Moveable property—Ordinance No. 8 of 1871—"Future goods"—Sale of Goods Ordinance No. 12 of 1896
DARLEY, BUTLER & CO. v. DE SILVA .. xiv.

Bond—

—To keep the peace
See SECURITY TO KEEP THE PEACE (1)

Breach of Peace—

—(1)Jurisdiction of Police Magistrate to require security to keep the peace—Sec. 287, Penal Code—Sec. 80, Criminal Procedure Code
FALLIL v. VEERAPPEN .. .. iv.
—(2)
See SECURITY FOR KEEPING THE PEACE (2)

Breach of Promise of Marriage—

—Failure of action—Recovery of expenses
HARMANIS v. CARLINA *et al.* .. .. xii.

Building—

—Ordinance No. 17 of 1887, sec. 2.—Prescription—Burden of proof—Sec. 283 of Ordinance No. 17 of 1887
See SILVA v. JUAN .. .. .. vii.

Buddhist Temporalities—

—Proper person to sue or be sued
ANDRIS APPU v. DANIEL .. .. .. i.

Ceylon Government Railway—

—Action for goods lost
See ACTION (15)

Charge—

—(1)Framing—Requisites—Criminal Procedure Code (Ordinance No. 15 of 1898), sec. 187 (1), also secs. 148 (*b*), 187 (3) & 188 (1)
GOONEWARDENE v. BABUN .. 141
—(2)Written report by headman—Procedure—Charge should be in writing—Secs. 148 (*b*) and 187 (1) & (2), Criminal Procedure Code
GOONEWARDENE v. BABUN .. .. v.
—(3)
See CRIMINAL MISAPPROPRIATION

Chena Land—

See WASTE LANDS

Children—

—born *ex prohibitu concubitu*
See INTESTATE SUCCESSION

Civil Procedure Code—

Sec. 5
See SLANDER OF TITLE
Secs. 5 & 6
See ASSESSMENT (1)
Sec. 18
See JOINDER OF PARTIES
Sec. 27
See PROCTOR (2)
Secs. 35 (1) *a*, 196 & 207
See *Res Judicata* (2)
Sec. 55
See INJUNCTION
Secs. 55, 86, 87, 704, 707 & 710
See SUMMONS
Secs. 111, 114 & 154
See EVIDENCE (3)
Secs. 184, 134 & 156
See PROCEDURE (1)
Secs. 210 & 211
See COSTS (2)
Secs. 219, 298 & 337
See WRIT (1)
Secs. 244, 245 & 246
See ACTION (8)
Sec. 247
See ACTION (7) & (8) & FISCAL'S TRANSFER (2)
Secs. 256 & 282
See EXECUTION (2)
Secs. 286, 325 & 377 (*b*)
See FISCAL'S SURVEYOR
Sec. 315
See FISCAL
Sec. 327
See EXECUTION (2)
Secs. 325, 327 & 377 (1)
See EXECUTION (6)
Sec. 402
See ABATEMENT
Sec. 418
See *Res Judicata* (3)
Sec. 640
See ACTION (6)
Sec. 753
See REVISION
Sec. 756
See APPEAL (4)
Sec. 823
See TRIAL (1)
Sec. 372
See GIVING FALSE INFORMATION TO PUBLIC OFFICER

Claim to Land—

See TRESPASS (2)

Close Season—
See GAME

Commitment—
See CRIMINAL TRIAL

Compensation—
—(1)Claim for, in partition action
See PARTITION (3)
—(2)Claim by lessee on acquisition
See LAND ACQUISITION
—(3)To tenant
See LANDLORD & TENANT (1)

Confession—
—Admissibility—Confession by one of several co-accused.
THE KING v. FERNANDO .. .. xx.

Consent of Husband—
See AGREEMENT TO SELL (1)

Contract—
—By a married man
See AGREEMENT TO SELL (1)

Contract of Service—
See MASTER & SERVANT (2)

Contract of Sale—
—Acceptance—Sale of Goods Ordinance, No. 11 of 1896, sec. 4
MACKIE v. FERNANDO .. .. .. xvii.

Contract—
—Agreement to sell—Failure—Action for recovery of earnest money—Oral evidence—Admissibility to prove contract required to be in writing—Evidence Ordinance (No. 14 of 1895) sec. 91
PERERA v. SILVA 47

Conviction—
See APPEAL (3)

Co-ownership—
See PARTITION (1)

Co-owners—
—(1)Action by one on behalf of the other co-owners—Where some of the plaintiffs have no interest in the land—Dismissal—Regularity of procedure
BANDA *et al.* v. BANDA .. .. .. xv.
—(2)
See PRESCRIPTION (1)

Corroboration—
—Of evidence of mother
See MAINTENANCE (2)

Costs—
—(1)Prospective—Inclusion of such costs in writ—Practice
DIAS v. VON POSSNER 49
—(2)Power of Court—Apportionment—Secs. 210 & 211, Civil Procedure Code
FERNANDO v. ANTHONI PILLAI v

Court—

—Power of
See COSTS (2)

Court of Requests—

—(1)
See ASSESSMENT (1) & (3)

—(2)
See ABSENCE OF DEFENDANT

—(3)
See JURISDICTION (5)

Covenant to Warrant and Defend—

See VENDOR AND VENDEE

Criminal ProcedureCode—

—Sec. 14
See DISTRICT COURT (1)

—Sec. 80
See BREACH OF PEACE (1)

—Sec. 80 (1)
See SECURITY TO KEEP THE PEACE (3)

—Secs. 148 (*b*), 187 (1) & (2)
See CHARGE (3)

—Sec. 180
See GAMING (1)

—Sec. 183
See ROBBERY (1) & (2)

—Secs. 187 (1), 148 (*b*), 187 (3) & 188 (1)
See CHARGE (1) & (2)

—Sec. 188
See ADMISSION OF GUILT

—Sec. 292
See MAGISTRATE (2)

—Sec. 321
See SENTENCE

—Sec. 335, 336 & 337
See APPEAL (3)

—Secs. 356 & 357
See SUPREME COURT (1)

—Sec. 372
See GIVING FALSE INFORMATION TO PUBLIC OFFICER (1)

Criminal Misappropriation—

—Appropriation of money out of several sums—Charge—One offence—Tender of witnesses on the indictment—Practice
THE KING v. FERNANDO .. ..xviii.

Criminal Trial—

—Commitment to District Court on indictment—Regularity of proceedings in lower court—District Court cannot question regularity of committal
THE KING v. BOOVA *et al.* .. .. .. xvii.

Damages—

—(1)Action for
See ACTION (9)

—(2)
See INTERIM INJUNCTION

Debtor—

—(1)Examination of,
See WRIT (1)

—(2)Discharge from custody
See FISCAL & EXECUTION (7)

—(3)
See INSOLVENCY (2)

Decree—

—(1)
See EXECUTION (1) & (2)

—(2) Execution of
See ACTION (6)

—(3)Application to set aside
See SUMMONS

Deed—

—(1)Interpretation— *Fidei commissum*
SENANAYAKE *et al.* v. DISANAYAKE *et al.* ..xvii.

—(2)Of gift—Power of revocation—Execution of subsequent deed—Necessity of special deed of revocation
THE GOVERNMENT AGENT, W. P. v. PALANIAPPA CHETTY *et al.* 1

—(3)Of gift—Dowry deed—Interpretation
PAKEER BAWA *et al.* v. HASSEN LEBBE *et al.* .. 61

—(4)Of gift—Action to set aside—Fraud of creditor—Necessary allegations
CARPEN CHETTY v. CHRISTINA HAMY *et al.* .. 169

Desertion—

See MASTER & SERVANT (2)

Destruction by Fire—

—(1)*Onus* of proof
FERNANDO v. PERERA *et al.* .. .. xv.

—(2)
See HIRE (1)

Dismissal of Action—

—(1)
See MORTGAGE BOND

—(2)
See *Res Judicata* (1) & (3)

Disorderly Conduct—

See SECURITY FOR KEEPING THE PEACE (2)

Dissolution of Partnership—

See PARTNERSHIP

District Court—

—(1)Criminal jurisdiction—Penal Code, sec. 68—Criminal Procedure Code, sec. 14
THE KING v. DIAS .. .. .. ix.

—(2)Jurisdiction
See FORGED DOCUMENT

—(3)
See CRIMINAL TRIAL

Documents—

—Tendered in Evidence
See EVIDENCE (3)

Donation—

—Minor—Acceptance—*Fidei Commissum*—Right of survivorship
BABAI HAMY v. MARCINA HAMY *et al.* .. x.

Dowry Deed—

See DEED (3)

Due Diligence—

See WRIT (1)

Due Presentment—

See PROMISSORY NOTE

Earnest Money—

See CONTRACT

Escape from Custody—

—Escape of person arrested only on suspicion—Charge under sec. 219, Penal Code
NAWANA v. FERNANDO .. .. .. vi.

Evidence—

—(1)Production of records in evidence
SILVA v. FERNANDO .. .. .. xiv.

—(2)Accuracy of survey plan—Evidence Ordinance, sec. 83—Presumption—Bases of measurement
THE SURVEYOR-GENERAL v. DE SILVA .. ii.

—(3)Admittance of evidence after close of case—Documents tendered in evidence—Production—Civil Procedure Code, secs. 111, 114 & 154
PERERA v. AWISHAMY *et al.* 115

—(4)
See KANDYAN LAW (3)

—(5)Oral
See PARTNERSHIP

—(6)Corroboration of mother's
See MAINTENANCE (2)

—(7)
See CONTRACT

—(8)Survey plan
See SURVEYOR

—(9)After close of case.
See PROCEDURE (1)

—(10)By husband
See INTESTATE SUCCESSION

Execution

—(1)Of decree—Resistance—Procedure—Judgment-debtor
FERNANDO *et al.* v. HETU ETANA .. .. xx.

—(2)Of decree—Resistance—Enquiry under sec. 327 of the Civil Procedure Code—*Onus* of proving title
JAYAWARDENE v. THEGIS *et al.* 109

—(3)
See FISCAL'S TRANSFER (1)

—(4)
See WRIT (6)

—(5)In mortgage action
See ACTION (6)

—(6)Resistance—Proof of hindrance—Burden of proving title—Civil Procedure Code, secs. 325, 327 & 377 (1)—Interlocutory order—No appeal from—Effect
ABUBAKKER LEBBE v. APONSU *et al.* xii

Execution—(*contd.*)

—(7)Of Writ—Re-issue—Power of Court—Fiscal's return to writ—Deposit of subsistence allowance—Release of debtor—Opening of outer door of dwelling house —Effect of these provisions in regard to Crown—Civil Procedure Code, secs. 298, 300, 311, 318, 366 & 371
THE ATTORNEY-GENERAL v. PONNIAH .. x.

Execution Sale—

—(1)
See FISCAL'S TRANSFER (2)

—(2)Material irregularity—Non-advertisement in the "Gazette"—Substantial injury—Sale at an undervalue —Civil Procedure Code, secs. 256 & 282
IN THE MATTER OF THE ESTATE AND EFFECTS OF DON EMIS, DECEASED 157

Exemption from Toll—

See TOLL (2)

Expert Evidence—

See SURVEYOR

False Evidence—

—Requisites of proof
THE KING v. NAGAMANY .. .. ..xvix.

False Information—

—(1)Given to public officer—Complaint to a subordinate public officer—Ceylon Penal Code, sec. 150
PERERA v. SILVA 33

—(2)Chairman, Local Board—Public servant—Sec. 19, Penal Code—Sec. 180, Penal Code—Nature of information
KINDERSLEY v. DAVID 179

Fermented Toddy—

See ARRACK (1)

Fidei Commissum—

See DONATION

—(2)
See JOINT WILL

—(3)
See DEED (1)

Fire—

—(1)Destruction of house hired—*Onus* of proving unavoidable accident
KULATUNGAM v. SAPAPATHIPILLAI *et al.* .. 135

—(2)
See DESTRUCTION BY FIRE (1)

Fiscal—

—Unlawful discharge of debtor from custody—Extent of liability—Payment of subsistence money—Detention on credit—Sec. 315, Civil Procedure Code
SARVAI v. MURRAY 37

Fiscal's Conveyance—

See FISCAL'S SALE

Fiscal's Sale—

—Issue of conveyance after institution of action—Title—Prescription
PONNAMMA v. WEERASOORIA *et al.* .. .. iii.

Fiscal's Surveyor—

—Obstruction by third party—Summary powers of the Court—Secs. 286, 325 & 377 (*b*), Civil Procedure Code—Public Servant
UKKU MENIKA v. RATWATTE 126

Fiscal's Transfer—

—(1)Execution after institution of action—Title—Prescription
PONAMMA v. WEERASURIYA *et al.* 57

—(2)Execution sale—Claim before transfer was obtained—Title—Action under sec. 247, Civil Procedure Code
BABASINGHO *et al.* v. DON SALMON *et al.* .. 75

Forged Document—

—Abetting—Valuable security—Jurisdiction of District Court—Penal Code, secs. 102, 456 & 459
KING v. DHARMAWARDENE *et al.* .. i.

Framing Charge—

See CHARGE (1)

Framing of Issues—

See ISSUE

Future Goods—

See BILL OF SALE

Game—

—Shooting during close season—Requisites of proof—Or-

Hemp—

—Possession of locally grown hemp--Licensee Poisons Ordinance—Ordinance No. 17 of 1905 (2) & 3 (1)—Ordinance No. 11 of 1901, sec. 2
ATTYGALLE v. WICKREMATUNGE 158

Hire of Bicycle—

See LETTING & HIRING

Hospital—

—Liability of
POWERS v. MASSACHUSETTS HOMŒOPATHIC HOSPITAL 81

Husband—

—Admissibility of Evidence of
See INTESTATE SUCCESSION

Execution—(*contd.*)

—(7)Of Writ—Re-issue—Power of Court—Fiscal's return to writ—Deposit of subsistence allowance—Release of debtor—Opening of outer door of dwelling house —Effect of these provisions in regard to Crown—Civil Procedure Code, secs. 298, 300, 311, 318, 366 & 371
THE ATTORNEY-GENERAL v. PONNIAH .. x.

Execution Sale—

—(1)
See FISCAL'S TRANSFER (2)

—(2)Material irregularity—Non-advertisement in the "Gazette"—Substantial injury—Sale at an undervalue —Civil Procedure Code, secs. 256 & 282
IN THE MATTER OF THE ESTATE AND EFFECTS OF DON EMIS, DECEASED 157

Exemption from Toll—
See TOLL (2)

Expert Evidence—
See SURVEYOR

False Evidence—

—Requisites of proof
THE KING v. NAGAMANY .. .. ..xvix.

False Information—

—(1)Given to public officer—Complaint to a subordinate public officer—Ceylon Penal Code, sec. 150
PERERA v. SILVA 33

—(2)Chairman, Local Board—Public servant—Sec. 19, Penal Code—Sec. 180 Penal Code—Nature of inform-

Fiscal's Sale—

—Issue of conveyance after institution of action—Title—Prescription

PONNAMMA v. WEERASOORIA *et al.* § .. .. iii.

Fiscal's Surveyor—

—Obstruction by third party—Summary powers of the Court—Secs. 286, 325 & 377 (*b*), Civil Procedure Code—Public Servant

UKKU MENIKA v. RATWATTE 126

Fiscal's Transfer—

—(1)Execution after institution of action—Title—Prescription

PONAMMA v. WEERASURIYA *et al.* 57

—(2)Execution sale—Claim before transfer was obtained—Title—Action under sec. 247, Civil Procedure Code

BABASINGHO *et al.* v. DON SALMON *et al.* .. 75

Forged Document—

—Abetting—Valuable security—Jurisdiction of District Court—Penal Code, secs. 102, 456 & 459

KING v. DHARMAWARDENE *et al.* .. i.

Framing Charge—

See CHARGE (1)

Framing of Issues—

See ISSUE

Future Goods—

See BILL OF SALE

Game—

—Shooting during close season—Requisites of proof—Ordinance No. 10 of 1891

SAIBO v. KATHIRKAMERTAMBY vi

Gaming—

—(1)Keeping a gaming place—Joinder of charges—Sec. 180, Criminal Procedure Code

GOONETILLEKE v. ALLIS *et al.* .. iv.

—(2)

See VILLAGE TRIBUNAL (2)

Gansabawa—

See JURISDICTION (5)

Gift—

—Deed of

See DEED OF GIFT (4)

Giving False Information to Public Officer—

—(1)Public officer as contemplated by the section—Enquirer into deaths—Ceylon Penal Code, sec. 180—Judgment—Criminal Procedure Code, sec. 372

BANDA v. MOHOTTY HAMY 46

—(2)Cause of injury or annoyance—Enquiry by Police Inspector—Penal Code, sec. 180.

PIERIS v. KANKANI — .. .. iii.

Imprisonment—

See MAINTENANCE (5)

Improvements—

—(1)

See LANDLORD & TENANT (2)

—(2)Effected by tenant

See LANDLORD & TENANT (1)

Injunction—

—Service—Language in which copy should be served—sec. 55, Civil Procedure Code

WIJESINGHE v. BAWA .. .. .. v.

Insolvency—

—(1)Proceedings when adjudication is disputed by insolvent—Where petition of petitioning creditor mentions no act of insolvency—Consequent dismissal of petition—Affidavit supporting petition

IN THE MATTER OF THE INSOLVENCY OF GAFFOOR 129

—(2)Adjudication of debtor in custody—Release—Detaining creditor's right to be heard

IN THE MATTER OF THE INSOLVENCY OF GAFFOOR xvii.

Interim Injunction—

—Damages—Liability of applicant

MARIKAR v. CAFFOOR .. .. .. x.

Interlocutory Order—

See EXECUTION (6)

Interpretation—

See DEED (1) & (3)

Intestate Succession—

—Adulterine bastards—Children born *ex prohibitu concubitu*—Right to mother's estate—Access—Admissibility of husband's evidence—Evidence Ordinance (No. 14 of 1895), secs. 112 & 120

IN THE MATTER OF THE ESTATE OF JAMES PERERA, DECEASED iii

Issue—

—Objection to framing—Right of Court to frame issue not pleaded in answer—Appeal

DUREYA *et at.* v. SIRIPINA 125

Joinder of Charges—

See GAMING (1)

Joinder of Parties—

—Interpretation—*Fidei commissum*

FONSEKA *et al.* v. NONA .. .. .. xv.

Joint Will—

—(1)Civil Procedure Code, sec. 18

PERERA *et al.* v. FERNANDO .. .. xiv.

—(2)Interpretation—*Fidei commissum*

FONSEKA *el al.* v. NONA .. .. xv.

Judge—

—Powers of—Alteration of order made by predecessor in office

IN THE MATTER OF THE ESTATE OF RENGASAMY, DECEASED .. .. i.

Judgment Debtor—

See EXECUTION (1)

Jurisdiction—

—(1)Of District Court
See FORGED DOCUMENT (1)

—(2)Of Police Magistrate
See MISCHIEF (1)

—(3)Of Police Magistrate
See BREACH OF PEACE (1)

—(4)Supreme Court—Municipal Councils' Ordinance (No. 7 of 1887) Secs. 15, 16 & 42—Trienniel List of Voters—Application for insertion of names on—Refusal by Chairman—Right to appeal
GALLE VOTERS' CASE 143

—(5)Court of Requests—Gansabawa
RODRIGO *et al.* v. GREGORIS *et al.* .. .. xvi.

—(6)
See VILLAGE TRIBUNAL (1)

—(7)
See VILLAGE TRIBUNAL (2)

—(8)
See MAINTENANCE (4)

—(9)
See TRESPASS (2)

—(10)Of District Court
See DISTRICT COURT (1)

—(11)Of Court of Requests
See ASSESSMENT (3)

Kandyan Law—

—(1)Acquired property of deceased husband—Right of Widow
KALU v. LAMI 30

—(2)Acquired property—Interest of Widow
JOSIN NONA *et al.* v. BATIN NONA *et al.* .. xi.

—(3)Adoption—Evidence
DINESA *et al.* v. BAISO .. .. .. xvii.

Keeping Gaming Place—

See GAMING (1)

Labour—

—(1)Ordinance No. 11 of 1865
See MASTER & SERVANT (1)

—(2)
See MASTER & SERVANT (2)

Landlord and Tenant—

—(1)Small Tenements Ordinance No. 11 of 1882 - Improvements effected by tenant—Possession by tenant till compensated
COSTE v. ABEYAKOON 35

—(2)Improvements effected by tenant—Right of tacit hypothec
KOUNA HAMY v. JAYASURIA .. .. xiii.

Land Acquisition—

—Claim by lessee of claimants for compensation
GOVERNMENT AGENT, W. P. v. COOREY *et al.* .. iv.

Last Will—

—Signature of testatrix
IN THE MATTER OF THE LAST WILL AND TESTAMENT OF SULTAN UMMA .. .. xi.

Leave to Appeal—

—In assessment cases
See ASSESSMENT (1)

Lessor and Lessee—

—Possession of leased land by lessor—Prescription—Ordinance No. 22 of 1871, sec. 3
FERNANDO v. FONSEKA 5

Lessee—

—Claim for compensation on acquisition
See LAND ACQUISITION

Letting and Hiring—

—Hire of bicycle—Liability of hirer
ISMAIL v. BROCHER 43

Local Board—

See FALSE INFORMATION (2)

Loss of Record—

See WRIT (4)

Magistrate—

—(1)Successor—Prejudice to accused—Sec. 292, Criminal Procedure Code
DINGIHAMY v. JANIS APPU .. .. xvix.

—(2)Powers of
See MAINTENANCE (3)

—(3)Jurisdiction of
See PREVIOUS CONVICTION

Maintenance—

—(1)Warrant—Power of imprisonment—Warrant for more than one month's arrears—Legality—Sec. 9 of Ordinance No. 19 of 1889
CORNELIA v. SAMODIS 139

—(2)Paternity—Corroboration of mother's evidence
MENCHI NONA v. HENDI SINNO .. .. ii.

—(3)Imprisonment for failure to pay—Powers of magistrate
CORNELIA v. SAMODIS .. .. .. vi.

—(4)Residence—Jurisdiction—Ordinance No. 19 of 1889
FERNANDO v. EASSIN .. .. .. xv.

Mala Fide Possession—

See AGREEMENT TO SELL (1)

Marriage—

See BREACH OF PROMISE

Married Woman—

See AGREEMENT TO SELL (1)

Master and Servant—

—(1)Labour Ordinance No. 11 of 1865, sec. 11—Staleness of prosecution—Set off against wages—"Advances" —Ordinances No. 13 of 1889, sec.6 (3)—Assent to appropriation of wages

SAUNDERS v. SINNIAH KANGANY 102

—(2)Contract of service—Liability on subsequent contract Desertion—Labour Ordinance (No. 10 of 1865) sec. 11

GRANT v. ALAGAMMA 165

—(3)Notice to quit need not be in writing—Verbal notice sufficient—Sec. 3 of Ordinance No. 11 of 1865

GREVE v. CARPEN .. .. .. vii.

Material Irregularity—

See EXECUTION SALE (2)

Mesne Profits—

—Action for

See Res Judicata (2)

Minor—

See DONATION

Mischief—

—Evidence of serious wounds—Jurisdiction of police magistrate

THEONIS v. SIMANIS .. .. iv.

Non-Joinder—

See APPEAL (4)

Notice to Quit—

See MASTER & SERVANT (3)

Negligence—

—(1)With respect to animals

See PUBLIC NUISSANCE

—(2)Goods lost by

See ACTION (15)

Land Acquisition—

—Claim by lessee of claimants for compensation
GOVERNMENT AGENT, W. P. v. COOREY *et al.* .. iv.

Last Will—

—Signature of testatrix
IN THE MATTER OF THE LAST WILL AND TESTAMENT OF SULTAN UMMA .. .. xi.

Leave to Appeal—

—In assessment cases
See ASSESSMENT (1)

Lessor and Lessee—

—Possession of leased land by lessor—Prescription—Ordinance No. 22 of 1871, sec. 3
FERNANDO v. FONSEKA 5

Lessee—

—Claim for compensation on acquisition
See LAND ACQUISITION

Letting and Hiring—

—Hire of bicycle—Liability of hirer
ISMAIL v. BROCHER 43

Local Board—

See FALSE INFORMATION (2)

Loss of Record—

See WRIT (4)

Magistrate—

—(1) Successor—Prejudice to accused—Sec. 292, Criminal Procedure Code

Mala Fide Possession—

See Agreement to Sell (1)

Marriage—

See Breach of Promise

Married Woman—

See Agreement to Sell (1)

Master and Servant—

—(1)Labour Ordinance No. 11 of 1865, sec. 11—Staleness of prosecution—Set off against wages—"Advances" —Ordinances No. 13 of 1889, sec.6 (3)—Assent to appropriation of wages

Saunders v. Sinniah Kangany 102

—(2)Contract of service—Liability on subsequent contract Desertion—Labour Ordinance (No. 10 of 1865) sec. 11

Grant v. Alagamma 165

—(3)Notice to quit need not be in writing—Verbal notice sufficient—Sec. 3 of Ordinance No. 11 of 1865

Greve v. Carpen .. .. .. vii.

Material Irregularity—

See Execution Sale (2).

Mesne Profits—

—Action for

See Res Judicata (2)

Minor—

See Donation

Mischief—

—Evidence of serious wounds—Jurisdiction of police magistrate

Theonis v. Simanis .. .. .. iv.

Mortgage Bond—

—Action on—Non-production of original bond—Dismissal of action

Rahiman v. Amardeen *et al.* 28

Mortgage Decree—

See Action (6)

Moveable Property—

See Bill of Sale

Municipal Councils Ordinance—

—(1)

See Jurisdiction (4)

—(2)*See* Building

—(3)No. 5 of 1867

See Annual Value (1)

Obstruction—

—(1)Peace officer searching for toddy—Assistance of renter's peons—Offence under sec. 183, Ceylon Penal Code

PINTO v. UKKU 163

—(2)

See PEACE OFFICER (1)

—(3)To Fiscal's Surveyor

See FISCAL'S SURVEYOR (1)

Office Assistant—

See POLICE MAGISTRATE (1)

***Onus*—**

—(1)

See DESTRUCTION BY FIRE (1)

—(2)

See PRACTICE

—(3)

See FIRE (1)

—(4)Of proving negligence

Order—

—To pay into Court amount of claim before defending

See SUMMONS .. ..

Oral Evidence—

—(1)

See PARTNERSHIP

—(2)

See CONTRACT

Overt Act—

See PRESCRIPION (2)

Ordinance—

No. 12 of 1840, sec. 6

See WASTE LANDS

No. 10 of 1844, sec. 14

See ARRACK (3)

No. 10 of 1844, sec. 32

See ARRACK (2)

No. 10 of 1844, secs. 46, 51 & 59

See ARRACK (1)

No. 10 of 1863, sec. 2

See PARTITION (1)

No. 11 of 1865, sec. 3

See MASTER & SERVANT (3)

No. 10 of 1865, sec. 11

See MASTER & SERVANT (2)

No. 11 of 1865, sec. 11

See MASTER & SERVANT (1)

Ordinance—(*contd.*)

No. 11 of 1865, sec. 19
See TRESPASS

No. 5 of 1867
See ANNUAL VALUE (1)

No. 5 of 1867, sec. 1
See ASSESSMENT (3)

No. 5 of 1867, sec. 5
See ASSESSMENT (1)

No. 8 of 1871
See BILL OF SALE

No. 22 of 1871, sec. 3
See LESSOR & LESSEE

No. 22 of 1871, secs. 9 & 11
See PRESCRIPTION (3)

No. 11 of 1882
See WRIT (4)

No. 11 of 1882
See LANDLORD & TENANT (1)

No. 7 of 1887
See ASSESSMENT (2)

No. 7 of 1887, sec. 7
See ASSESSMENT (1)

No. 7 of 1887, secs. 15, 16 & 42
See JURISDICTION (4)

No. 17 of 1887, secs. 2 & 283
See BUILDING

No. 13 of 1889, sec. 6 (3)
See MASTER & SERVANT (1)

No. 15 of 1889, sec. 8
See SURVEYOR

No. 19 of 1889
See MAINTENANCE (4)

No. 19 of 1889, sec. 9
See MAINTENANCE (1)

No. 24 of 1889
See VILLAGE TRIBUNAL (2)

No. 10 of 1891
See GAME

No, 8 of 1893
See PAWN BROKER

No. 12 of 1895, sec. 8, sub-secs. 2 & 3
See ABSENCE OF DEFENDANT

No. 12 of 1895, sec. 4
See ASSESSMENT (3)

No. 12 of 1895, sec. 13 (1)
See ASSESSMENT (1)

Ordinance—(*contd.*)

No. 14 of 1895, sec. 83
See EVIDENCE (2)

No. 18 of 1895, sec. 91
See CONTRACT

No. 14 of 1895, secs. 112 & 120
See INTESTATE SUCCESSION

No. 11 of 1896
See BILL OF SALE

No. 11 of 1896, sec. 4
See CONTRACT OF SALE

No. 1 of 1897, sec. 24
See WASTE LANDS

No. 7 of 1899, sec. 6
See PREVIOUS CONVICTION

No. 11 of 1901, sec. 2
See HEMP

No. 17 of 1905, secs. 3 (2) & 3 (1)
See HEMP

Penal Code—

—Secs. 19 & 180
See FALSE INFORMATION (2)

—Sec. 48
See TRESPASS

—Sec. 68
See DISTRICT COURT (1)

—Secs. 102, 456 & 459
See FORGED DOCUMENT

—Sec. 180
See GIVING FALSE INFORMATION TO PUBLIC OFFICER also FALSE INFORMATION (1) & (2)

—Sec. 183
See OBSTRUCTION (1)

—Sec. 183
See PEACE OFFICER (1)

—Sec. 219
See ESCAPE FROM CUSTODY

—Sec. 282
See PUBLIC NUISANCE

—Sec. 287
See BREACH OF PEACE (1)

—Secs. 367 & 380
See ROBBERY (2)

Partition—

—(1)Owner of divided share—Conduct—Intervention—Planter's interest—Allegations of co-ownership—Sec. 2 of Ordinance No. 10 of 1863

KURUNERU v. DE SILVA 11

—(2)Action—Agreement to sell share to be allotted by final decree—Moveable property—Bill of sale—Registration

MOHAMED BHOY *et al.* v. DIAS *et al.*.. .. xi.

—(3)Action—Claim for compensation—Admissibility .. iii.

SILVA *et al.* v. SILVA *et al.*.. .. .. iii.

—(4)Action for

See ABATEMENT

Partnership—

—Dissolution—Action for accounting—Oral evidence to establish partnership—Admissibility

SINGHO APPU v. AMARASURIYA .. .. v.

Paternity—

See MAINTENANCE (2)

Pawnbroker—

—Ordinance No. 8 of 1893—Articles left as security for goods purchased—Not an act against the Ordinance

GOONETILLEKE v. MAM-NEINA .. .. xviii.

Peace Officer—

—(1)Obstruction—Assistance—Sec. 183, Penal Code—Where search should be made

PINTO v. UKKU .. .. .. viii.

—(2)

See OBSTRUCTION (1)

—(3)Power to seize fermented toddy

See ARRACK (1)

Petition—

—(1)Of appeal

See APPEAL (5)

—(2)Of insolvency

See INSOLVENCY (1)

Petty Theft—

See VILLAGE TRIBUNAL (1)

Planter's Share—

See PARTITION (1)

Poisons Ordinance—

See HEMP

Police Magistrate—

—(1)Office Assistant to the Government-Agent—Charge by dead man—Competency of the Office Assistant as Police Magistrate to hear the charge

THEPANIS v. PERERA *et al.* .. .. vii.

—(2)Jurisdiction of

See BREACH OF PEACE (1)

—(3)Jurisdiction of

See MISCHIEF

—(4)Jurisdiction of

See PREVIOUS CONVICTION

Postponement—

See TRIAL (1)

Power of Attorney—

—Power to act during absence of principal—Act done by agent during residence of principal

SEGU MOHAMADO v. GOVINDEN .. .. xiii.

Powers of Judge—

See JUDGE

Practice—

—Trial—Where onus is on defendant—Right to call plaintiff

KIRA v. MENIKA 152

—(2)

See COSTS

Prædial Products—

See THEFT (2)

Prescription—

—(1)Co-owners—Interruption of prescription by one of several co-owners

ANDRIS v. DE SILVA .. .. .. xi.

—(2)Overt act—Nature

FERNANDO *et al.* v. FERNANDO .. .. xiv.

—(3)Claim for work done by an elephant—Ordinance No. 22 of 1871, secs. 9 & 11

JAYAWARDENE v. ISI LEBBE .. .. xiv.

—(4)

See AGREEMENT TO SELL (1)

—(5)

See FISCAL'S TRANSFER (1)

—(6)

See LESSOR & LESSEE

—(7)

See FISCAL'S SALE

—(8)

See BUILDING

Prescriptive Possession—

See ACTION (7)

Previous Conviction—

—Summary jurisdiction of Police Magistrate—Ordinance No. 7 of 1899, sec. 6

ISMAIL LEBBE v. GUSTAN APPU .. .. xvi.

Principal & Agent—

See POWER OF ATTORNEY

Procedure—

—(1) Where case has been closed—Right to adduce further evidence—Civil Procedure Code, secs. 184, 134 & 166

KERAMEN *et al.* v. MARKAR .. .. xix.

—(2)

See CO-OWNERS (1)

—(3)

See EXECUTION (1)

—(4)

See CHARGE (2)

Proctor—

—(1) Appointment—Proxy—Omission of client to sign before institution of legal proceedings—Subsequent ratification

TILAKERATNE v. WIJESINGHA .. .. ix.

—(2) "Incapacity to act"—Temporary absence from the Island—Civil Procedure Code, sec. 27

FERNANDO v. MARIKAR .. .. .. ix.

Production of Documents—

See EVIDENCE (3)

Production of Record—

See EVIDENCE (1)

Promissory Note—

—Due presentment—Proof

SAIBO v. SAIBO 45

Proof—

See PROCTOR (1)

Public Nuisance—

—Penal Code, sec. 282—Negligence with respect to animals

GUNESEKERE v. CHRISTINA HAMY .. .. ii.

Public Officer—

See GIVING FALSE INFORMATION TO PUBLIC OFFICER (1) & (2) also FALSE INFORMATION (1) & (2)

Public Servant—

—(1)

See FISCAL'S SURVEYOR

—(2)Chairman Local Board

See FALSE INFORMATION (2)

Purchase Money—

See VENDOR & VENDEE

***Quia Timet* Action—**

See SLANDER OF TITLE

Reduction of Assessment—

See ASSESSMENT (1)

Registration—

See LAST WILL

Re-issue of Writ—

—(1)

See WRIT (4)

—(2)

See EXECUTION (7)

Release—

—(1)Of debtor

See EXECUTION (7)

—(2)Of debtor

See INSOLVENCY (2)

***Res Judicata*—**

—(1)Dismissal of action by administratrix because letters not duly stamped—Subsequent action on the same cause of action

KARUNAWARDENE v. WIJESURIYA *et al.* ..

—(2)Action for declaration of title—Subsequent action for mesne profits—Civil Procedure Code, secs. 35 (1) (a), 196 & 207

KIRI BAIYA v. SLEMA LEBBE *et al.* ii

—(3)Dismissal of action—Sec. 418, Civil Procedure Code

PALANIAPPA CHETTY v. GOMES *et al.* .. vii.

—(4)

See WRIT (3)

Resistance to Execution—

—(1)

See EXECUTION (2)

—(2)

See EXECUTION (1)

—(3)

See EXECUTION (6)

Revision, Power of—

—When such power should be exercised—Civil Procedure Code, sec. 753
PERERA v. SILVA 79

Revocation of Deed of Gift—

See DEED (2)

Robbery—

—(1)Conviction for theft—Sec. 183, Criminal Procedure Code
THE KING v. PODI SINNO .. .. iv.
—(2)Charge of—Conviction for theft—Criminal Procedure Code, sec. 183—Ceylon Penal Code, secs. 367 & 380
THE KING v. PODI SINNO .. .. .. x.

Sale—

See EXECUTION SALE

Sale of Goods—

—(1)
See BILL OF SALE
—(2)
See CONTRACT OF SALE

Security to Keep the Peace—

—(1)Non-forfeiture of bond on conviction—Subsequent forfeiture
SALLAY v. PERERA 7
—(2)Forfeiture of bond—Disorderly conduct—Breach of the peace
CADER v. PERERA 166
—(3)Sec. 80 (1) Criminal Procedure Code
GRAHAM v. ALAGIE .. .. .. v.

Seduction of Coolies—

See TRESPASS (1)

Sentence—

—Accused already undergoing imprisonment—Sentence to commence at expiration of previous sentence—Order to run concurrently irregular—Sec. 321, Criminal Procedure Code
GODAGAMA v. MATHES .. .. .. viii.

Service—

– (1) Of Summons
See SUMMONS
– (2) Of injunction
See SUMMONS

Slander of Title—

—Action—Civil Procedure Code, sec. 5—Action *quia timet* —When it lies—Requisites—English Law

CEYLON LAND & PRODUCE COMPANY v. SENEVIRATNE .. .. xx.

Servitude—

See BEACHING FISHING BOATS

Signature—

See LAST WILL

Small Tenements—

See LANDLORD & TENANT (1) & WRIT (4)

Staleness of Prosecution—

See MASTER & SERVANT (1)

Subsistence Money—

See FISCAL

Subsistence Allowance—

See EXECUTION (7)

Substantial Injury—

See EXECUTION SALE (2)

Succession—

See THESAVALAMAI

Summary Jurisdiction—

See PREVIOUS CONVICTION

Summons—

—Service of—Translation of summons in defendant's language—Application to set aside decree—Order to pay into Court amount of claim before being allowed to defend—Civil Procedure Code, secs. 55, 86, 87, 704, 707 & 710

PERERA v. JAMES 122

Supreme Court—

—(1)Powers of—Power to increase amount or nature of punishment—Criminal Procedure Code, secs. 356 & 357

COREA v. GIRIGORIS .. .. .. xvi.

—(2)

See JURISDICTION (4)

Surveyor—

—Cancellation of license—Ordinance No. 15 of 1889, sec. 8 —Plans certified by Surveyor-General—Rebuttal of presumption of accuracy—Evidence Ordinance, sec. 60 —Expert evidence—Admissibility of treatises

THE SURVEYOR-GENERAL v. DE ZILWA .. 168

Survey Plan—

—Accuracy

See EVIDENCE (2)

Survivorship—

—Right of

See DONATION

Security to Keep the Peace—

See BREACH OF PEACE (1)

Tacit Hypothec—

See LANDLORD & TENANT (2)

Tender of Witnesses on the Indictment—

See CRIMINAL MISAPPROPRIATION

Theft—

—(1)

See ROBBERY (1) & (2)

—(2) Removal of prædial products—*Bona fide* claim to property

WIJEYESINGHE v. DE SARAM .. .. vi.

Thesavalamai—

—Succession

THIAGARAJAH v. PILLAI *et al.* .. .. xv.

Title—

—(1)

See FISCAL'S TRANSFER (1) & (2)

—(2)

See FISCAL'S SALE

Tolls—

—(1) Evasion—Horse taken over a portion of road adjoining a toll station

JUAN APPU v. SINNA SWAMI 21

—(2) Sale of right to levy—Right of Government to exempt passengers

ATTORNEY-GENERAL v. LOUIS HAMY .. xiv.

Tort Feasor—

See ACTION (9)

Trespass—

—(1) Intent to seduce coolies—Offence under sec. 19 of Ordinance No. 11 of 1865—Penal Code, sec. 48

SENARATNE v. CHARLES *et al.* .. .. xiii.

—(2) *Bona fide* claim to land—Magistrate has no jurisdiction—Acquittal

SOURJAH v. FERNANDO .. .. .. xviii.

Trial—

—(1) Appearance of Proctor—Application for postponement—Refusal—Subsequent proceedings—Civil Procedure Code, sec. 823

PERUMAL CHETTY v. GONETILEKE ..

—(2) Procedure

See PRACTICE

Unqualified Admission—

See ADMISSION OF GUILT

User—

See BEACHING FISHING BOATS

Vacancy—

See ASSESSMENT (2)

Valuable Security—

See FORGED DOCUMENT

Vendor and Vendee—

—Covenant to warrant and defend—Action against vendor for return of purchase money and damages

UKKU MENIKA v. DINGIRI *et al.* 15

Verbal Notice—

See MASTER & SERVANT

Village Tribunal—

—(1) Jurisdiction—Petty theft—Meaning

NADAN v. PERUMAL *et al.* .. .. v.

—(2) Jurisdiction—Gaming place—Sec. 6 of Ordinance No. 24 of 1889

ABAYAKOON v. DIONIS .. .. .. vii.

Warrant—

—For arrears of maintenance

See MAINTENANCE (1)

Waste Lands—

—Chena land—Presumption in favour of Crown—Ordinance No. 12 of 1840, sec. 6; and Ordinance No. 1 of 1897, sec. 24—Implied repeal

KIRI BANDA v. THE GOVERNMENT AGENT, SABARAGAMUWA PROVINCE 69

Widow—

—Right of to acquired property of deceased husband

See KANDYAN LAW (1) & (2)

Witnesses—

—Tender of

See CRIMINAL MISAPPROPRIATION

Writ—

—Due diligence—Examinatitn of debtor—Civil Procedure Code, secs. 219, 298 & 337

WIJEYESEKRE v. PERERA 2

—(2)Inclusion of prospective costs

See COSTS

—(3)*Res judicata*—Failure to shew cause against issue of writ—Subsequent application to certify payment of judgment debt

ENSOHAMY v. MARIKAR 5

—(4)Re-issue—Small Tenements Ordinance (No. 11 of 1882) —Loss of record—Refusal—Validity

PERERA v. PERERA .. .. .. iii.

—(5)

See EXECUTION (7)

—(6)Issue pending appeal to the Privy Council—Application to stay .

ATTORNEY-GENERAL v. PERERA .. .. xii.